IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 150 OF 2021

METHOD LEODIGA KOMBA @ TODI ..... 1ST APPELLANT

ISIHAKA ADAM ..... 2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Gwae, J.)

dated the 11th day of November, 2020

in

Criminal Appeal No. 17 of 2020

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JUDGMENT OF THE COURT

16th & 21st February, 2024

LILA, J.A.:

This is a second appeal by the appellants. Being unsuccessful in their first appeal to the High Court against convictions and sentences entered by the District Court of Simanjiro sitting at Orkesumet for committing unnatural offence contrary to section 154(1)(a) of the Penal Code, they are now before this Court protesting their innocence. In masquerading his identity, the victim of the offence, a boy aged 15 years, shall be referred to as either PW1 or simply the victim.

Incarceration in prison is essentially a consequence of the appellants being arraigned in court on a charge which alleged that they had carnal knowledge against the order of nature of the victim on 29/4/2019 at Zaire Kati street - Mirerani within Simanjiro District in Manyara Region. Following denial of the charge, the prosecution paraded six witnesses to prove the charge and the defence also produced six witnesses.

It was common ground that the appellants and the victim were familiar to each other. The 1st appellant and the victim resided at the same area called Zaire Kati whereas the 2nd appellant worked as "chapati" roller at an area near a restaurant of the victim's mother at Msikitini - Zaire Kati area. They differed on what transpired on the incident date.

This brief summary, represents, albeit briefly, the substance of the prosecution evidence on the incident. According to PW1, while proceeding home from his mother's business on 29/4/2019 at around 9:00hrs, he met the appellants at Al Farah Mosque where, with the aid of tube light, he identified them and they asked him to spend a night at the 1st appellant's room and he accepted the invitation. Describing the 1st appellant's room, he said, there were two beds but only one had a mattress and the room had no cement floor and the walls were not

plastered. While therein, the appellants grabbed him and placed him on the bed, ordered him to undress his trouser and underwear and then kneel down. Then, the 2nd appellant covered his mouth thereby allowing them opportunity to, in turn, carnally know him against the order of nature, the 1st appellant being the first to penetrate him by inserting his penis into his anus after rubbing it with oil followed by the 2nd appellant. With the aid of the torch flashlight in the room which the appellants had, he was able to see them applying oil on their penises which he saw them to have been circumcised. The two did so twice each before morning time when the 2nd appellant gave him TZS 20,000.00 and PW1 left for home. First to meet at home was his father one Hamadi Amri (PW2) who asked him where he had spent the night, afraid to tell him the truth, he said he slept at one Ramadhani's (PW4) homestead who was called and denied such allegation. It was then when PW2 took PW1 to police station where, upon being inquired by a woman police one WP 7127 PC Happy (PW5), he revealed that he slept at the 1st appellant's room where both appellants carnally knew him against the order of nature. To prove being penetrated, he was taken to Mirerani Health Center where he was examined by a Doctor one Tasei N. Mbwambo (PW6) who found his anus open and discharging fluid which he medically established to be spermatozoa proving that he was

penetrated. He posted the results in a PF3 (exhibit P2). A policeman one E 7250 D/CPL Wito (PW3), who investigated the case, visited the crime scene and drew a sketch map (exhibit P1), confirmed the description of the 1st appellant's room to be of the same nature as was explained to him by PW1.

Both appellants refuted the accusation in their sworn defence evidences and mostly relied on the defence of *alibi*. They were supported in material particulars by two witnesses each. The 1st appellant (DW1) claimed that on the material date, which was a Monday, he spent the whole day and slept till Tuesday at his home at Zaire ya Kati where he stayed with his father, mother and his young siblings. He further said that his uncle one Adam Alex Komba (DW4) visited them on Tuesday 30/5/2019 at 8:00. Explaining how he was arrested and linked with commission of the offence, he said while at his workplace on Tuesday, he was arrested by police on accusation of committing unnatural offence. He admitted knowing the victim and put as defence, that he had long standing grudges with his father (PW2) but he did not cross-examine him about it when he testified. He summoned Paul Alex Komba (DW3) and DW4 as his witnesses who, substantially, told the trial court that the 1st appellant spent the whole two days (Monday till Tuesday) at home.

The 2nd appellant (DW2) defended himself claiming that he was arrested and taken to Mirerani police station at 10:00 on 29/4/2019 on accusation of carnally knowing PW1 against the order of nature which he said was not true because at that time he was at Msikitini - Zaire ya Kati where he was rolling chapati. He admitted knowing PW1 as he used to see him and his mother. He said that at the police station he met PW5, who claimed she knew him by face and promised to fix him saying *"wewe lazima nikupige namba"* which literally mean *"I will make sure you serve years"* but when he asked her if she was a magistrate, she left. Mariam Idd (DW5) and Marijali (actually called Rajay) Idd shaban (DW6) testified as his witnesses. DW5, owner of the business where the 2nd appellant worked as chapati roller and seller, said that the 2nd appellant starts working at 6:00am until 11:00hrs or 12:00hrs depending on business of that day and that, on 29/5/2019, she was with the 2nd appellant until 12:00hrs when he closed the business.

On his part, DW6 who worked as a "madrasa" teacher and also used to assist DW5 in her hotel business, testified that on 29/4/2019, it was the 2nd appellant who closed the business and, after taking food at 23:00hrs with the 2nd appellant, the 2nd appellant escorted DW5 to go home. That on 30/4/2019, he was at his home and went to the hotel at 6:00hrs.

After consideration of the evidence by both sides, the learned trial magistrate was in full agreement with the prosecution that the appellants were guilty, he convicted them and sentenced each of them to serve forty (40) years imprisonment. The verdict of guilty was primarily predicated on the evidence of the victim (PW1) and the Doctor (PW6) together with the PF3 he tendered as exhibit P2. This is evident from the trial magistrate's judgment at pages 41 and 42 of the record of appeal where he stated that: -

> *"In short, the above is the total evidence in this case, court raised one issue before decision, the issue is whether the case accused persons are charged with was proved beyond reasonable doubt.*
>
> *Answering the above issue and after reading careful (sic) the evidence on record this court found the case was proved as per the required cardinal principle which is beyond the reasonable doubt. No doubt that PW1 was done unnatural, testimony of PW1 Doctor and PF3 prove (sic). No doubt that accused persons all did unnatural to PW1 as charged, they were properly identified by the victim (PW1) at Al Farah mosque (they met and took him) to the scene of crime which is the room of 1st accused taking into consideration also that PW1 and the accused knew each other even*

before the night of 29/4/2019. Source of light at Al Farah Mosque which is electrical tube light and torches' light to the room of 1st accused together with the in advance knowledge to each other assisted the proper identification of the victim to the accused persons. Much more victim described the environment of the room of 1st accused where the incident of 29/4/2019 took place and it is the same description seen by PW3 when he went to draw the map of the scene of crime – exh. P1. In their defence accused persons especially 1st appellant were silent about the room environment as stated by PW1 and PW3, their silence means what was spoken by the prosecution side as accuseds' case is concerned is only truth..."

The appeal to the High Court was unsuccessful as it concurred with the trial court's decision save for exhibit P2 which was expunged from the record for want of being read out in court for the appellant to comprehend its contents. Before us, the appellants are seeking to challenge the High Court decision upon six (6) grounds of complaints. We need not reproduce them for a reason soon to be disclosed.

While a reading of the prosecution evidence and particularly that of the victim and PW6, one may be moved to agree with the findings of the learned trial magistrate and the learned judge on first appeal, one

nagging and very pertinent question which the learned trial magistrate never addressed his attention to and come up with an answer, is whether PW1 was credible. However, in relation to PW1's credibility, the learned judge, sitting on appeal and therefore without having had an opportunity to observe the victim testifying, concluded thus at pages 67 and 68 of the record of appeal: -

> *"Lastly, the appellants' complaint no. 4 on the alleged failure by the prosecution to prove the charge beyond reasonable doubt. According to the evidence richly adduced by the victim (PW1) which is also corroborated by that of the medical expert (PW6) as well as the evidence adduced by the PW2 and PW5 to whom the victim was able to tell what made him absent from his parent's residential house on the night of the material date.* ***The evidence of the victim is credible to safely secure a conviction as per section 127(7) of the Tanzania Evidence Act, Cap. 6 Revised Edition, 2002*** *unless the contrary was established by the appellants which is not the case here. More so, the victim's testimony is sufficiently corroborated as rightly argued by Mr. Hatibu, the respondent's State Attorney..."*
> [emphasis added]

Quite in disagreement with the learned judge's finding, the appellants have challenged him when arguing grounds three (3) and six (6) of their joint memorandum of appeal which are couched thus: -

> *"3. That, the lower courts erred in law and in fact in holding that the case was proved as per the required cardinal principle which is beyond doubt.*
>
> *6. That the lower courts erred in law and fact when convicting and sentencing the appellants while the prosecution side was not proved (sic) the case against the appellants beyond reasonable doubt."*

After dispassionately perusing the prosecution evidence, leave alone the defence case, we have respectfully found ourselves fully convinced that, from the litany of complaints found in the memorandum of appeal, consideration of these two grounds only is decisive of the appeal. For this reason, we have not found it necessary to enumerate all the six grounds of appeal and the parties' respective arguments on the remaining four grounds, not even in a summary form.

Whereas, at the hearing of the appeal, the appellants appeared in persons and without an advocate, the respondent Republic was represented by Ms. Neema Mbwana, Ms. Eunice Makala and Ms. Tusaje Samwel, all learned State Attorneys.

It is worth noting right at the inception that it was the 1st appellant who elaborated the grounds of appeal and the 2nd appellant simply adopted the arguments as being of both of them without more. It was therefore their contention that the decisions of the two courts below were unsustainable on account of the glaring error which went unnoticed by both courts below that they wrongly relied on the testimony of PW1 who was unreliable to convict them. This, they convincingly argued, is evident from the record of appeal that PW1 did not report early to his father the ordeal that befell him on 29/4/2019 and particularly the claim by PW1 supported by PW2 that it was not the first time the offence was committed against him but it began since he was in Form One till when he was in Form Three. They also showed their surprise as to why his mouth be covered if they had practiced the same habit since long and if it was true that it was the 1st appellant who trained him that practice. Such a delay in reporting, they argued, raised doubt relying on the Court's decision in **Yust Lala vs. Republic**, Criminal Appeal No. 337 of 2015 (unreported). To substantiate PW1 being untruthful, they argued that PW1 cheated his father right away at home that he slept at the house of one Ramadhani (PW4) who denied the claim in court and also at the police station before PW5 that he spent the fateful night at his brother's homestead before he later named

the appellants as the ones who took him to the 1St appellant's room where he slept and was ravished against the order of nature. Based on those arguments, they urged the Court to find PW1 unreliable and hold that the charge was not proved to the required standard, then quash and set aside their convictions, set aside the imposed sentences and let them free.

Admittedly, the trial court did not completely consider PW1's credibility. This glaring omission, now a subject of appeal, as rightly contended by the appellants, was a flagrant violation of the trite position now that words of victims, particularly in sexual offences, should not be accepted wholesome and relied on to found a conviction. This principle of law which is now common and has attained a respectable antiquity and is often referred to by the Court was pronounced in the case of **Mohamed Said vs. the Republic,** Criminal Appeal No. 145 of 2017 (unreported), that the word of the victim of the sexual offence should not be taken as gospel truth but that such testimony should pass the test of truthfulness.

In the instant appeal, the trial court did not, in its judgment, expressly state that it was in any way moved or believed PW1 as a witness of truth or credible. As would be discerned from the above quoted part of the judgment, it simply examined her evidence and held

that it was corroborated by the testimonies of PW2 and PW6. As a trial court, trite legal proposition is that determination of credibility by demeanour is within its exclusive domain (See **Yasin Ramadhani Chang'a vs. Republic** [1999] T.L.R. 489). The issue of her credibility first featured in the High Court judgment. It is common knowledge that, even an appellate court may assess a witness's credibility by looking at the evidence on record. In **Shabani Daud vs. Republic,** Criminal Appeal No. 28 of 2000 (unreported), the Court stated that:

> *"The credibility of a witness can also be determined in two other ways; One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses including that of the accused."*

As shown earlier, the High Court found PW1 credible. The question we ask ourselves is whether such finding is well founded. To provide an answer we shall subject the testimony of PW1 to an objective test and in doing so we shall be guided by principles governing credibility. To start with, generally, settled law is that every witness deserves to be believed as telling the truth unless there are cogent reasons suggesting otherwise (See **Goodluck Kyando vs. Republic** [2006] T.L.R 363). The issue here is whether PW1 was truthful. Guidance on how to gauge a

witness's credibility has been lucidly expounded in the case of **Chrizant John vs. Republic,** Criminal Appeal No. 313 of 2015 and **Salum Ally vs. Republic,** Criminal Appeal No. 106 of 2013 (both unreported). In the last case, the Court stated that: -

> "— *on whether or not, any particular evidence is reliable, depends on its credibility and the weight to be attached to such evidence. We are aware that at its most basic,* ***credibility involves the issue whether the witness appears to be telling the truth as he believes it to be.*** *In essence, this entails the ability to assess whether* ***the witness's testimony is plausible or is in harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in the circumstances particularly in a particular case.*** *The test for any credible evidence is supposed to pass, were best summarized in the case of* ***Abdala Teje @ Malima Mabula vs. Republic,*** *Criminal Appeal No. 195 of 2005 (unreported), to be: -*
>
> *(i)* ***Whether it was legally obtained;***
>
> *(ii) Whether it was credible and accurate;*
>
> *(iii) Whether it was relevant, material and competent;*

(iv) Whether it meets the standard of proof requisite in a given case, otherwise referred to as the weight of evidence or ***strength of believability****."*

[Emphasis added]

In the light of this guidance and dimensions, the circumstances surrounding each case has to be considered when credibility of a witness evidence comes to question.

In the instant case, it is on record that, on PW1's returning back home, he first met his father (PW2) who wanted to know from him about where he spent the night. It is, ordinarily, expected that such would have been the momentous opportunity for him to tell and explain the ordeal he had faced that material night. We say so bearing in mind that PW1's evidence implies that his being penetrated was by force hence non-consensual as he claimed that, upon arrival at the 1st appellant's room, the appellants grabbed and laid him on the bed, ordered him to undress his trouser and underwear and then kneel down and the 2nd appellant covered his mouth and they, in turn, carnally knew him against the order of nature. Hurt by such action, one would have expected him to be happy to meet his father whom to report the ordeal for necessary actions against the ravishers. Surprisingly, that was not the case. It is common knowledge that naming a culprit at the earliest

opportunity signifies credence on the part of an identifying witness. That principle, we think, applies in equal weight to a victim of any other offence. He or she has to report it to a person he first encounters unless reserving such information is for good reasons. In this case, PW1 lied to his father by replying that he slept at PW4's residence which statement was disproved by PW4. He said he was afraid to tell his father the truth. Ms. Makala was firm that the circumstances did not allow him to tell the truth. There is, unfortunately, no material to bail her out in that assertion. On our reading of his testimony, we find no evidence from which it may be inferred or suggested that he was put under any threat by his father. To the contrary, it seems clear that PW2, as a responsible father, wanted to know where PW1 had slept.

Next to be considered is the circumstances under which PW1 came to name the appellants as his ravisher. According to him, it was after being taken to Mirerani police station, when he named the appellants as being the ones who carnally knew him against the order of nature after he had accepted an invitation extended to him by the 1st appellant to go and sleep in his room. That, he named the appellants to a woman police (PW5). But, the circumstances under which such information was extracted were best told by PW2 and PW5. Starting with PW2, he said: -

"...Then I took Yahaya to Police Mirerani all was the efforts to know where this Yahaya slept. At Police we found a woman Police called Happy told me she was to talk with him separate from me, then she left with Yahaya, after some minutes she came with Yahaya and told me, the thing she is going to tell me, I should not cause confrontation as they needed my cooperation till the end, I replied I was ready. I promised to cooperation. Then she told me the last night my son was taken by two (2) boys one is Todi I told her I know Todi as he is working his motorcycle mechanics activities near the restaurant of my wife Mariam, then Police Happy said, the boy Yahaya told her that, this Todi started to sodomize my boy Yahaya long time and that night was not the first time, then she told me we have to go to Hospital to prove whether it is true my son is sodomized/done unnatural..."

And, the telling by PW5 on the same is this: -

"On 30/4/2019 I was at Mirerani Police post continued with my daily activities while there in Dawati Office, I was called by the CRO Officer who told me there was an issue concerning you (Dawati), that there was a young boy who was with his father, I welcome them at the Office, at the Office the father told me his son is troubling

him, doesn't want to go to school and the previous night didn't sleep at home, I told the father to give me a chance to talk with his son, he gave us a chance after a child wanted his father to quit, while was with a boy I asked him why you are troubling and where did you on sleep the previous night, the child said, he didn't sleep to their home he slept to his brother, I asked him if you slept to your brother why you farewell at home and replied he fare welled no body I continued to talk with him to get the truth, I told him many stories about children then I wanted him to go to, he but wanted me to tell his father. I agree, then the boy told me that, he was sodomized at the anus, I asked him who did that and said one he knows him by the name of Isihaka working at the (Mgahawa) restaurant of Mariam near the Mosque (Msikitini) and other he knows him by the name of Todi and his face, thereafter I told his father that, we were to go to Hospital for medical checkup..."

If the above pieces of evidence of PW2 and PW5 are anything to go by, they, in the totality proved that PW1 was hard to tell who sodomised him and that, even before PW5, he first lied that he slept at his brother's place before coming up with the appellants' names. The evidence by these two witnesses, apparently, reveal that PW1 and PW5

had a private conversation before the appellants were named by PW1. We are troubled, if PW1 was really ravished by the appellants, why was he so difficult to name the appellants. Even the naming of the appellants raises doubt as to what actually happened when the two (PW1 and PW5) held private talks. It was questionable as to how such information was solicited. It smacks of having been contrived or procured through promises and therefore worthless. We think this discourse justifies the complaint of the appellants in this appeal to the effect that both courts relied on an incredible evidence of the victim to convict them. PW1's evidence is not worth of belief. Paying homage to a cardinal principle in criminal justice, the appellants should have the benefit of the doubt interpreted in their favour. In view of this, we respectfully find ourselves unable to share the certitude of the learned first appellate judge to the effect that PW1 was reliable and we have no other option but hold PW1 unreliable. Since, neither of the remaining witnesses claimed to have had seen the appellants commit the offence which is an essential ingredient to be established by the prosecution, in the absence of PW1's evidence, the remaining evidence is incapable of proving that he spent the material night at the 1st appellant's room and that it was the appellants who carnally knew the victim.

In the upshot and for the foregoing reason, we allow the appellants' appeal, quash their convictions and set aside the sentences meted on them by the trial court and sustained by the High Court on first appeal. We hereby order their immediate release from prison if not retained for another lawful cause.

DATED at **ARUSHA** this 21st day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

I certify that, this is a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL