IN THE COURT OF APPEAL OF TANZANIA

AT SUMBAWANGA

(CORAM: KOROSSO, J.A., MWAMPASHI, J.A., And MASOUD, J.A.)

CRIMINAL APPEAL NO. 521 OF 2019

BATHROMEO VICENT.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)

(Mrango, J.)

dated the 18th day of November, 2019

in

Criminal Appeal No. 86 of 2019

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JUDGMENT OF THE COURT

13th & 18th March, 2024

KOROSSO, J.A.:

Bathromeo Vicent, the appellant in this appeal, has filed this appeal, being aggrieved by the decision of the High Court of Tanzania at Sumbawanga, in Criminal Appeal No. 86 of 2019 which upheld the conviction and sentence imposed on him by the District Court of Mpanda at Mpanda in Criminal Case No. 23 of 2019. The charge which the appellant was called upon to face was Unnatural Offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap 16 (the Penal Code). It was alleged that between 01/1/2019 and 02/2/2019 in Kanoge area within Mpanda District, Katavi Region, the appellant, did have carnal knowledge against the order

of nature of a boy aged nine (9) years old (who we shall henceforth refer to as "the victim" or "PW1" to conceal his identity).

To better understand the appeal before us, we find it appropriate to give the contextual setting as gathered from the record of the appeal. The appellant and the victim and their families resided in Kanoge area, Mpanda District, Katavi Region. On diverse dates from 01/1/2019 to 02/2/2019, the appellant went to the bush to graze goats and took the victim with him. It was during this period of going to graze goats, that the appellant was alleged to have had carnal knowledge of the victim against the order of nature, twice on separate days. It transpired, however, that the victim did not report both incidents to his parents. However, after the second incident, he could neither walk nor sit on a chair properly and his anus discharged blood/pus. When his health condition worsened, the victim informed his grandmother of his condition and that the appellant had sodomized him. His grandmother (PW3) took him to the Police post, reported the incident, and with a PF3 on hand went to Kanoge Hospital for medical treatment. At the hospital, the victim was attended by Adam Mnyawi (PW4), a clinical officer, whose finding was that the victim's anus had been penetrated by a blunt object, having found bruises and observed the weakened muscles there. Thereafter, PW4 duly filled the PF3 which was admitted in the trial court as exhibit P1.

In his defence, five witnesses testified including the appellant himself as DW1, and denied committing the offence and raised the defence of *alibi*. DW1 stated that on 01/1/2019, he had spent the day at a farm with family members and on 02/1/2019 he had spent it at the church with his father. The trial court rejected the appellant's evidence convinced that the prosecution proved the case to the standard required, consequently, convicted the appellant for the offence charged and sentenced him to serve life imprisonment.

The appellant was dissatisfied with both the conviction and sentence imposed by the trial court and appealed to the High Court, unsuccessfully. He is now before us having preferred an appeal to challenge the decision of the High Court. His appeal is premised on five (5) grounds of appeal which may be paraphrased into the following complaints: **One**, that the prosecution failed to prove the charge to the standard required by the law. **Two**, failure of the High Court to draw an adverse inference given the five-day delay in reporting the commission of the offence charged. **Three**, not considering that the prosecution's failure to tender the appellant's cautioned statement and/or to call the police investigator to testify rendered the charge unproven against the appellant. **Four**, failure to consider the defence evidence in contravention of the law, and **five**, failure

to address the concern raised that the charge against him was one framed by the prosecution side.

At the hearing of the appeal, the appellant appeared in person and fended for himself, whereas the respondent had the services of Mr. Deusdedit Rwegira, learned Senior State Attorney and Mr. Kizito John Kitandala, learned State Attorney.

When faced with an opportunity to amplify his appeal grounds, the appellant, commenced by adopting his grounds of appeal and urged us to allow the learned State Attorney to submit first, and he reserved the option to rejoin thereafter if the need will arise.

Mr. Kitandala, took the lead in submitting for the respondent/DPP, kickstarted expounding that he was supporting the appeal, convinced that the prosecution did not prove the charge against the appellant beyond reasonable doubt. He advanced the following reasons for the position taken: **One**, that there is variance between the contents of the charge and the evidence since, while the charge stated that the offence took place between 01/1/2019 and 2/2/2019, the evidence of the prosecution witnesses does not give light to when the charged incidents took place. He argued that PW1, the victim, testified that it was sometime in 2019 when he went to the bushes to graze goats with the appellant and was sodomized by him. PW2 stated to have witnessed when the victim could

not properly walk and was discharging pus from his anus, but the time this happened is not revealed. Similarly, Hawa Maseli ((PW3), the victim's grandmother, testified that it was on 02/01/2019 at 20.00 hours when the *Sungusungu* persons came to her house looking for the victim's father to go with them to the appellant's house to arrest him. The only thing PW3 noticed was that the victim was not walking properly by then.

The learned State Attorney further contended that the issue of the dates the offence charged occurred is further confused by the evidence of PW4, the clinical officer at Kanoge Health centre who testified that he attended the victim on 2/2/2019 and examined him on the same date as reflected in the PF3 (exhibit P1). He argued that in addition, the evidence of Maren Magesa (PW5), the victim's mother was that, between 1/1/2019 and 2/2/2019, the victim had health problems and refused to go to school and was unable to walk properly. That, on being asked what the problem was, the victim told her that the appellant had sodomized him in the bushes when they went to graze goats. He thus argued that the evidence does not clarify the actual dates the offence charged was committed as alluded to in the charge sheet and thus raises doubts. Doubts which should benefit the appellant.

The second reason for supporting the appeal, he argued, is the fact that the evidence of PW3 shows that the appellant was arrested on

2/1/2019, which does not augur well with the evidence of PW4, that he examined the victim on 2/2/2019, a month later. The inconsistency in such dates attracts doubts, he contended.

Therefore, according to the learned State Attorney, although there is no doubt that penetration was proved, as discerned from the evidence of PW1, PW2, and PW4, the prosecution did not prove that the appellant is the one who committed the offence charged. He thus urged us to allow the appeal, quash the conviction, and set aside the sentence imposed against the appellant.

The rejoinder by the appellant was brief, he appreciated the stand taken by the learned State Attorney and urged us to consider his grounds of appeal and set him at liberty so that he could join his family.

We have considered the submissions from the appellant and the learned State Attorney and the grounds of appeal. We are of the view that the appeal can be determined by addressing the first complaint which we find embraces grounds 1, 2, 3 and 5 of the appeal before us. The issue drawn therefrom is whether the charge against the appellant was proved to the standard required and if it will be necessary, we will address the remaining ground.

It suffices to say, the instant appeal being in the second appellate court, as a general principle, the Court is not expected to interfere with the concurrent findings of facts made by the lower courts. Interference can only occur, where there is misapprehension of evidence as stated in cases such as the **DPP v. Jaffar Mfaume Kawawa** [1981] T.L.R. 149, **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387 and **Dickson Elia Nsamba and Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported).

In the determination of the grounds of appeal, we shall simultaneously address the credibility of witnesses. As stated earlier, the appellant was charged and convicted of the offence of having committed an unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code. The Court had occasions previously when it deliberated on the ingredients of this offence stating that to prove the commission of the offence under section 154 (1) (a) of the Penal Code, the accused must have: **one**, carnal knowledge of another person against the order of nature [see, **Amrani Hussein v. Republic**, Criminal Appeal No. 13 of 2019 (unreported)]. **Two**, is committed to a child under the age of eighteen years and imposes a sentence of life imprisonment in terms of subsection (2) of section 154 of the Penal Code.

We find it apposite to also remind ourselves that, it is a cardinal principle of criminal law that the duty of proving the charge against an

accused person always lies on the prosecution. In the case of **John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika v. Republic** [2002] T.L.R. 296 it was held that:

> *"A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt".*

The threshold question for us to consider is whether the prosecution did realize its burden of proving that it is the appellant who committed the offence charged to the standard required. It is on record, that the prosecution side relied on five witnesses and one exhibit to prove its case against the appellant. To prove that the appellant had carnal knowledge of the victim against the order of nature as alleged, the prosecution had to prove as per the charge found on page 2 of the record of appeal, that this took place between 01/1/2019 and 2/2/2019. The evidence on record shows otherwise as we shall demonstrate.

PW1 testified that he was sodomized by the appellant twice in the year 2019 when he went with him to graze goats, which means, the incidents occurred within two days out of the possible 365 days of 2019 available. The evidence of PW2 does not disclose the date when he alleges

to have seen the victim discharging pus from his anus and failing to walk or sit properly. The evidence of PW3, the victim's grandmother, was to the effect that on 2/1/2019 at 20.00 hours, some *Sungusungu* persons came to her house wanting her husband to go with them to arrest the appellant at his house. PW3 also testified to have noticed that the victim was not walking properly. What this evidence infers is that on 2/1/2019, the victim had already been sodomized hence the urge to arrest the appellant on 2/1/2019 at 20.00 hours.

Upon examining the evidence of PW3 on the date the incident might have occurred as it relates to when the appellant was arrested, we agree with the learned State Attorney that an inference can be drawn that it is inconsistent with the testimony of PW4 on the same. PW4 had examined the victim and determined that the victim's anus apart from having bruises, had weakened muscles and discharged pus. He thus concluded that the victim's anus might have been penetrated by a blunt object and filled the PF3 (exhibit P1), had also testified to have received the victim on 2/2/2019. A date, which is one month later than the date of 1/2/2019, on which PW3 had stated to have witnessed the victim not walking properly and attempts made by the *Sungusungu* persons to arrest the appellant on allegations of sodomizing the victim. To note is the fact that, the date of

2/2/2019, is also reflected in exhibit P1 as the date PW4 conducted the medical examination on the victim.

Furthermore, PW5 had testified that the victim was sodomized between 1/1/2019 and 2/2/2019. With that evidence on record, certainly, there is no clarity on when the alleged incident giving rise to the charge took place. The prosecution witnesses evidence as to the date of the incident is contradictory and thus gives credence to the defence evidence.

The appellant's defence was essentially that of *alibi*. This is because when you consider the prosecution evidence, it borders down to the fact that the alleged offence was committed between 1/1/2019 and 2/1/2019 since the appellant's arrest was on 2/1/2019 around 20.00 hours. The appellant (DW1) testified that on 1/1/2019, he stayed with his family and that 2/1/2019 was spent at the Church. The said evidence was corroborated by that of Vicent Dionezio (DW2), the appellant's father and Patrick Laurence (DW3) the appellant's neighbour, who supported DW1's assertions on his whereabouts on 1/1/2019 and 2/1/2019. Charles Tarensius (DW4), a teacher of Christian Religion ("*Katekista*") at Kanoge RC Church, also supported the evidence of DW1, DW2 and DW3 that on 2/2/2019, the appellant was at the church and later went back home.

It is well settled that in criminal trials, the duty of the accused is to raise doubts on the prosecution case. In the circumstances of this case, we

are convinced that the defence case put holes in the prosecution case against the appellant. Taking into account the evidence of PW3, that the arrest of the appellant was on 2/1/2019, it means the alleged offence was committed early that day or on 1/1/2019. If that was the case then, how could PW4 have examined him on 2/2/2019 and still found bruises and discharge from the anus? Why should there have been such a long delay in taking the victim for medical examination? All these unexplained holes in the evidence raise doubts about the prosecution's evidence. We firmly believe that had the trial and first appellate court addressed the above concerns, they would have arrived at a different verdict and found that the prosecution failed to prove its case to the standard required.

We have considered the obvious contradictions in the evidence on the date when it is alleged the appellant committed the offence, and find the same to be fatal because they raise serious doubts on the prosecution evidence as stated earlier. In fine, we thus agree with the learned State Attorney that, essentially the contradictions and inconsistencies in the prosecution evidence lead to a conclusion that although the prosecution managed to show that there was penetration, it failed to prove that it is the appellant who committed the charged offence against the victim.

With the foregoing, we find no need to address the other remaining complaints. Our finding above that the case for the prosecution was not

proven beyond reasonable doubt is sufficient to determine this appeal. Consequently, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

DATED at **SUMBAWANGA** this 16th day of March, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgement delivered this 18th day of March, 2024 in the presence of the appellant in person/unrepresented and Ms. Hongera Malifimbo, Ms. Atupele Makoga, learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL