IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC CRIMINAL APPEAL NO. 54 OF 2016

(Originating from Iringa District Court in
Criminal Case No. 264 of 2015
before Hon. J.M. Mpitanjia, RM)

HALIDI HUSSEIN LWAMBANO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

14TH SEPTEMBER 2016 & 7TH OCTOBER 2016

SAMEJI, K. R. J

The appellant, Halidi Hussein Lwambano, was charged with unnatural offence contrary to Sections 154(1) of the Penal Code, [Cap 16 R.E. 2002] and then convicted and sentenced to life imprisonment. The appellant being aggrieved by both conviction and sentence he lodged this appeal. In his Petition of Appeal the appellant has filed a total of ten (10) grounds. For ease of reference, the same are condensed into a single ground that

the prosecution side failed to prove the case against the appellant beyond reasonable doubt.

Briefly, the evidence, which the trial Magistrate relied upon in convicting and sentencing the appellant shows that, on 19th August 2015, PW1, Elina Mgeni (the mother of the victim) left home and went to attend the funeral ceremony of her late father in law. When came back home she received information from her mother in law that, PW2, (her daughter Veronica Mgeni the victim) is sick. That they sent PW2 to the hospital for treatment, however, two weeks later they decided to take PW2 to the church for prayers as her condition was worsened that could not walk and sit properly. PW1 and PW5, (the pastor) calmly interrogated PW2 and she informed them that, she had been sodomized several times by her step father and she failed to disclose it as she was threatened to be killed if she tells the story to anyone. They, PW1 & PW5 took PW2 to the hospital and the doctor confirmed that PW2 had been carnally known for several times.

PW2 after *voire dire test* testified that, the first time when the appellant had carnal knowledge against her, was in the afternoon, when her mother PW1 was not at home. That, the appellant solicited her and promised to give her, Two Hundred Tanzanian Shillings, (Tshs.200/=), if

she agrees to have carnal knowledge with him, against the order of nature. That, she refused but the appellant pulled her inside by force and sodomized her and threatened her not to tell anyone and if she does, he will kill her. That, thereafter the appellant continued to perform the same act on several days and several times, as at that time, they were living together and sharing the same bed. (Appellant, PW1, (mother of the PW2) and PW2, the victim). In his defence before the trial court, the appellant, DW1, denied to have committed the offence. DW2 (the mother of the victim and wife of the appellant, testified that she was living with the appellant and her daughter since 2011 when PW2 was of seven (7) years old and when she separated with her husband the biological father of PW2. That, though she was living with the appellant her mother was not happy with the appellant, as he had not paid the bride price. PW2 had been sick for several times. That on 19/9/2015, PW2 was under the custody of her mother in-law.

During the hearing of the appeal, which was conducted orally, the appellant fended for himself while Mr. Felix Chakila, the learned State Attorney, represented the Respondent, the Republic.

In his submission, the appellant didn't have much to say, but only requested the Court to adopt the grounds of appeal as they appear in the Petition of Appeal.

In response, Mr. Chakila, while supporting both the conviction and the sentence, stated that, it was correct for the trial court to base its conviction on the evidence of the PW2, which was very clear and corroborated by the evidence of PW3. However, even if the same could have not been corroborated, the same is enough to convict the appellant under Section 127(7) of The Tanzania Evidence Act, [Cap. 6 R.E 2002]. The evidence of PW2 was credible enough, because the same was testified after the *Voire Dire Test* and in accordance with Section 127 (1) (2) of The Evidence Act, (supra). To substantiate his position Chakila referred the Court to page 9 -10 of the trial court proceedings and the case of **Omary Kijuu V Republic**, Criminal Case No.39 of 2005 (CA), at page 10 & 11.

Submitting on the 2nd and 3rd grounds of the appeal, Chakila stated that, in their testimonies, PW2 and PW3 confirmed that, the victim was sodomized. However, the evidence of defence was supposed to adduce evidence against these facts but the appellant didn't dispute the same

during the trial. At page 14 of the proceedings PW3 ably testified his findings. Therefore the two grounds 2 & 3 should be dismissed.

On the 4th and 5th grounds, Chakila argued that, the claim that the case was framed against the appellant due to the enemity among the parties and that the evidence of the prosecution witnesses is contradictory is not true, unfounded and afterthought. The appellant had never raised those concerns during the trial and specifically at the cross-examination.

As regards 6th ground of the appeal, Chakila submitted that, it is also an afterthought, because at page 14 of the proceedings the PW3 testified how he managed to find that PW2 was sodomized after he examined her. The PF3 was tendered properly in accordance with Section 240 of the Criminal Procedure Act.

On the issue of the excessive sentence, Mr. Chakila contended that the sentence pronounced by the trial court is appropriate and it was issued in accordance with the law. That, the appellant is charged under Section 154 (1) (a) of the Penal Code, which was amended by Section 185 of the Child Act No. 21 of 2009. The said amendment provides that, if the offence of this nature is committed to a child below 18 years, the accused must face a penalty of life imprisonment. In the case at hand the offence was

committed to a child of ten (10) years old, therefore the sentence given by the trial Court is appropriate.

On the claim that the defence evidence was not considered, Chakila referred the Court to page 4 and 5 of the typed Judgement and stated that, it is obvious that, the evidence of the defence was properly considered, but the trial court observed that the prosecution side had proved the case beyond reasonable doubt. Chakila concluded by stating that, the prosecution side had proved the case beyond all reasonable doubts by summoning five (5) witnesses and prayed the Court to dismiss the entire appeal for lack of merit.

In rejoinder, the appellant stated that, PW2 was not living with him, but was living with her grandmother. The said grandmother had been claiming for the bride price from the appellant as he started living with her daughter before payment of the same. The entire evidence was cooked against the appellant due to that misunderstanding. He thus prayed the Court to grant his appeal.

I have careful considered the submissions advanced by both parties, the record of proceedings at the trial court and the entire appeal together with the trial court Judgment, which is subject matter of this appeal, the

following are the deliberations of this Court in disposing the issue *whether the prosecution established its case against the appellant beyond reasonable doubt.*

In deciding this appeal, I am very much aware with the set principle that, this Court being the first appellate court, enjoys great liberty in re-evaluating the evidence and the law. Further that, this Court can interfere with findings of facts by the lower court if the said court completely misapprehended the substance, nature and quality of the evidence, resulting in an unfair conviction. See for example the cases of **Yohana Dionizi and Shija Simon Versus The Republic,** Criminal Appeal No. 114 and 115 of 2009, Court of Appeal of Tanzania at Mwanza, (Unreported) and **Kisembo V. Uganda** [1999] 1 EA.

In his 1st ground of the appeal the appellant is challenging the decision of the trial court for convicting and sentencing him based solely on the evidence of PW2 (victim). I wish to start by reminding the appellant that the offence he was charged with is on unnatural offence contrary to section 154(1)(a) of the Penal Code, (supra), which falls in the category of sexual offences.

As clearly submitted by Mr. Chakila, it is trite law in Tanzania that, the true and best evidence in sexual offences is the one, which comes from the mouth of the victim herself or himself. The said position of the law is found in Section 127 (7) of the Evidence Act [Cap 33 R.E 2002], which provides that, in criminal proceedings involving sexual offences the evidence of the victim is the best evidence and it does not require any further corroboration for it to be relied upon. The said section provides clearly that:-

" *Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent* ***evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that, such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of a tender years or the victim of sexual offence is telling nothing but the truth***". *(Emphasis is added).*

In accordance with the above section, the evidence of the victim, though uncorroborated, may be sufficient to sustain a conviction. A conviction can be grounded on the sole uncorroborated evidence of the victim provided the court warns itself of the danger of convicting on such evidence.

It is equally important to emphasize that, there are multitudes of authorities, which had since enunciated this particular principle. See for instance the case of **Seleman Makumba v. Republic,** (2006) TLR 379 and **Wile Silas v. The Republic,** Criminal Appeal No. 26 of 2011, Court of Appeal of Tanzania at Iringa, (unreported).

In the case at hand there is no dispute that PW2 was sodomized, this is in accordance with the testimony of PW2 herself, PW1, PW3, PW4 and PW5. Then, the trial court by applying the above principle, based on the testimony of PW2, the victim, convicted and sentenced the appellant on the offence charged. For more clarity, I deem it necessary to reproduce the testimony of PW2 adduced before the trial court. PW2, a girl and child of ten (10) years old after a *voire dire test*, testified that:-

> *"Before going to leave with my grandmother, I was living with my mother and my stepfather called Halidi Hussein. We*

were sleeping in one room and on the same bed. At night my father was putting his penis into my anus when my mother was asleep. I was not making noise because my father told me that, if I make noise he would kill me with a knife. For the first time, he did it in the afternoon, when my mother was not at home, she went to wash her clothes. My stepfather told me that if he puts his penis ('kidudu chake') into my anus, he will give me Two Hundred Tanzanian Shillings, (Tshs.200/=). I denied, he called two times, I denied again, he catched (sic) me by force and when I wanted to make noise he told me, I will kill you with knife". He continued doing so for several times. Initially I feared to tell my mother, but later I decided to tell her and my mother told me that I am telling lies against my father. When I went to live with my grandmother my aunt asked me 'why are you walking in such a way'? I told her that father inserted his penis into my anus. I was unable to sit and walk properly. My father started to do that act since I was in STD 1.

Based on the above principle and in connection with the testimonies adduced by PW2 and of course together with testimonies of PW1, PW3, PW4 and PW5 the trial court convicted and sentenced the appellant.

It is also the finding of this court that the trial court well applied the above principle by relying on the testimony of PW2, which was also corroborated by testimonies of PW1, PW3, PW4 and PW5. It has to be noted further that PW2 was not able to sit and walk properly and her sphenter muscles were unable to control anything, because something was forced into her anus, to the extent of having a discharge of faeces in her anus due to the dilated anus after being medically examined by PW3. Gathering all these evidence, it is without any flicker of doubt that, PW2 was sodomized. I thus find grounds 1, 2, 3, 4 and 9 of the appeal to have no merits.

I am aware that in his defence and even under grounds 4 and 5 of the appeal, the appellant is claiming that, the evidence of prosecution side was cooked and fabricated against him due to the bad relationship between him and the family of his wife. That, his mother in-law, is not appreciating him, as he had not paid the bride price. This fact was as well

supported and explained by DW2 his wife. I have however observed that, the problem of PW2 to be carnally known by her stepfather was not first observed or reported by the said mother in-law, but the same started to be noticed and detected due to a strange walking style of PW2. That PW2's health was not okay and they started treating her in a normal way. Initially, PW2 was discovered to have malaria and provided with medication. Though her condition continued to deteriorate. However no one detected anything, but only after noticing that PW2 cannot walk and sit properly, PW1, PW4 and PW5 politely asked her and she then revealed that she had been sodomized several times by her step father. With this background, I join hands with Mr. Chakila that, the claim that the whole case was framed against the appellant is not true, it is only an afterthought to exonerate himseif from this crime.

Coming to the issue on the contradictions of prosecution witnesses the appellant for instance under 5th ground of appeal, had raised a concerns that evidence of prosecution was not only hearsay but also contradictory. As clearly indicated above, the trial court based its conviction and sentence on the testimony of PW2 the victim and also PW3 the doctor

who examined PW2. All these are not hearsay evidence and not contradictory. As such even this ground lacks merit.

In the circumstance and taking into account that the conviction of the appellant was as well based on the credibility of PW2, (the victim), it is the trial court that was better placed in assessing the credibility of PW2 and was convinced of what she was telling during her testimony, which I also believe to be the true narration of what exactly happened to her due to the fact that PW2 was not able to sit and walk properly and there was a discharge of faeces in her anus due to dilated anus after being medically examined by PW3. It is therefore my considered view that the prosecution side had managed to prove its case to the required standard and as per section 127 (7) of the Evidence Act (supra).

As regards the 7th ground of the appeal on excessive sentence of life imprisonment pronounced by the trial court against the appellant, I do agree with the learned state attorney Mr. Chakila that, the appellant is charged with Section 154 (1) (a) of the Penal Code and the same was amended by Section 185 the Child Act No. 21 of 2009. In accordance with that amendment, the accused person, if commit this kind of offence, to a

child below 18 years must face a penalty of life imprisonment.

While I am aware and live to the above provisions of the law, I still see merit on the appellant's concerns. There is no dispute that life imprisonment is a sentence, which has an indefinite duration, no specific details on pardon and does not come with compulsory accessory penalties. Life imprisonment means a lifelong incarceration that a convicted person has to remain in prison for the rest of his life or until paroled. I therefore find this type of punishment to be odds and irreducible sentence that amount to inhuman treatment against all principles of international law and human rights treaties, which Tanzania is a party.

Life imprisonment denies any possibility for the accused person to reform and redeem from the previous behavior and become a good citizen. It departs from the essential meaning of punishment, which is reformation and social rehabilitation as enshrined in Article 10 (3) of the International Covenant on Civil and Political Rights, which Tanzania is also a signatory. [1] The said Article provides that:-

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[1] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc A/6316 (1966), 999 U.V.T.S 171, entered into force March. 23, 1976. Available at http://wwwl.unm.edu/humanrts/instree/b3ccpr.htm (last Visited in September 23rd, 2016).

*The **penitentiary system** shall comprise treatment of prisoners **the essential aim of which shall be their reformation and social rehabilitation**"*

Though I support the above principle and position my hands are tied as I have to apply the existing laws, until such time when the Tanzania Legislature will deem it necessary to change this position. In the circumstance, I hereby dismiss the appeal in its entirety and I uphold the decision of the District Court.

It is so ordered.

DATED at IRINGA this 7th day of October 2016.

R. K. Sameji.
JUDGE
7/10/2016

Judgement delivered in Court Chambers in the presence of Ms. Magreth Mahundi the learned State Attorney for the Respondent, the Republic and the Appellant.

A right of Appeal explained.

R. K. Sameji

JUDGE

07/10/2016

Certified as a true copy of the Original Judgement for the *Dc Criminal Appeal No. 54 of 2016.*

R. K. Sameji

JUDGE

07/10/2016