IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 18 OF 2021

(C/O Economic Crimes Case No. 7 of 2020 Sumbawanga District Court)

GODFREY S/O ANDINDILE MWAKITALIMA
@ MPENDASHULE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

16 & 31/08/2021

JUDGMENT

Nkwabi, J.:

The appellant was charged in the District Court of Sumbawanga for economic crimes case no 7/2020 for sexual favour contrary to section 25 of the Prevention and Combating of Corruption Act No. 11 of 2007 read together with paragraph 21 of the first schedule to, and section 57(1) and 60(2) of the Economic and Organized crimes Control Act, Cap 200 R.E. 2002 as amended by Act No. 3 of 2016.

The offence was allegedly committed by the appellant on 23rd July 2018 at Ilembula Guest house, Chanji area within Sumbawanga district in Rukwa region. The appellant being in position of authority as a lecturer of Paradise Business College situated at Isesa in Sumbawanga municipal, in the exercise of his authority as lecturer, did demand sexual favours from his student one Beatrice Pantaleo Katona as a condition for giving her pass marks as privilege in the examination of Entrepreneurship skills. The appellant had pleaded not guilty. But on trial, the trial court found him guilty as charged and convicted him and sentenced him to twenty years imprisonment.

In brief, the evidence of the prosecution was that PW2 Antony testified that the subject tutor is not allowed to communicate with a student and reveal student's marks. (Was not cross-examined on this). PW3 Fatuma the guest house attendant confirmed the PCCB officials arrested the appellant in the guest house with the victim of the offence and the appellant was covered only with bed sheet (she was also not cross-examined).

Then, PW4 Beatrice gave evidence that on 23/07/2018 she received a message from the appellant that she had failed Entrepreneurship skills examination. On inquiring, the principal denied that the results had been published. The appellant asked her for sexual affairs in order she gets favour from him on the examination. She reported to the PCCB. The PCCB officers set a trap. At the guest house, he told her that if she had sexual intercourse with her, she will pass the exams throughout her studentship. She opened the door for PCCB officers who got in. (The appellant did not cross-examine this witness).

In his defence, the appellant claimed that the victim was his lover, they had been as such since February 2018. She failed 4 subject and started approaching tutors for assistance. That she fabricated the case for she failed and he refused to assist her pass. He claimed he used to have sexual intercourse with her at the guest house and it was not the first time to spend with her there. He claimed to be innocent.

The appellant was supported in his defence by DW2 Reford Sanga (Academic Officer at the College) who had these to say, "I remember, before the incident the accused had love affairs with the victim while pursuing basic Technical Certificate of Community Development (level four) at Saint Aggrey College. He contradicts the testimony of the appellant.

Resentful of the decision of the district court of Sumbawanga in Criminal Case No. 7 of 2020, as I have shown above, the appellant lodged a petition of appeal to this court to show his displeasure with the decision. The petition of appeal has 7 grounds of appeal. On 18/03/2021 the appellant filed an additional petition of appeal without the leave of the court which had three additional grounds of appeal.

The total provocations of this appeal are jotted down hereunder:

1. That the trial District Court Magistrate erred in law and fact in convicting and sentencing the appellant herein for the said offence while the said offence was not proved beyond all reasonable doubt as required by law and hence reached to the wrong decision.

2. That the trial District Court magistrate erred in law and fact in convicting the appellant basing on the electronic evidence without satisfying itself as to its collection, handling, storage and admissibility of the said evidence which purports to be the communication between the appellant and the victim via mobile phone and that there is possibility that they may have been tempered with and hence reaching to the wrong decision.
3. That the trial magistrate erred in law and facts in disregarding the defence case that the victim is the lover to the appellant and thus there is possibility of the victim planning ill motive to the appellant and hence reaching to the wrong decision.
4. That the trial magistrate erred in law and facts in failing to ascertain that the case against the appellant was fabricated one as all the evidence showed that the case has been planned and fabricated and hence reaching the wrong decision.
5. That the trial district magistrate erred in law and fact in convicting and sentencing the appellant herein without considering the evidence of the defence to the effect that the case against the appellant has been fabricated because the complainant planned the act against the

appellant because she failed in her exams and wondered why her lover (the appellant) failed her and decided to fabricate a case against the appellant and hence reaching to the wrong decision.

6. That the trial district court magistrate erred in law and fact in believing that the words ***"Nakutaka wewe mtoto mzuri jamani aah hahahahaha ..."*** amount to demanding sexual favours and hence reaching to the wrong decision.
7. That the trial court magistrate erred in law and facts in failing to consider that the defence of the appellant and his witness succeeded to raise a reasonable doubt and hence reaching to the wrong decision.
8. That the circumstantial evidence which was relied upon to ground conviction by the trial magistrate was not credible and did not satisfy the three tests. He referred to Sarkar on evidence, 15th Edition 2003 Report Vol. 1 at page 63.
9. That there was no concrete evidence to show or prove that appellant being arrested in flagrante delicto did amount the whole aspect of favour to the victim.
10. That the trial magistrate was wrong in believing against the charge which does not disclose the whole aspect of sexual favour.

Then the appellant prayed for this court to quash the conviction and set aside the sentence and set him free from jail. The hearing of this appeal was carried out by way of oral submissions. The appellant appeared in person while the Respondent was represented by Mr. Fadhili Mwandoloma, learned Senior State Attorney. In his submission, the appellant prayed to adopt his grounds of appeal as his submission and rested his submissions. Mr. Fadhili Mwandoloma, learned Senior State Attorney for the respondent, welcomed the appeal.

Mr. Mwandoloma in his approval of the appeal presented that there is a procedural irregularity in the proceeding (PW1) at P.15 of the typed proceedings, gave opinion, "your honour given circumstance..... they were in preparation of having sexual intercourse". A witness is not required to give an opinion. In the circumstance, the charge was not proved beyond reasonable doubt. The messages were not clear. No assumption in criminal trial. The conviction be quashed and the appellant's sentence be set aside, Mr. Mwandoloma earnestly proposed.

The appellant had nothing in rejoinder. He concurred with the submissions of the learned State Attorney for respondent. He prayed he be set free.

In deciding this appeal, I will deal with one reason of appeal after the other. I will start with the 1st ground of appeal which in essence carries the appeal which is to the effect that the trial District Court Magistrate erred in law and fact in convicting and sentencing the appellant herein for the said offence while the said offence was not proved beyond all reasonable doubt as required by law and hence reached to the wrong decision.

While the appellant mantained his lamentations on the petition of appeal be taken as his submission, Mr. Mwandoloma approved that the appellant was wrongly judged that he was found in fragrant delicto. He agrees the appellant was not found red handed in the act so. The appellant ought to have been found in the act the victim was found in the room and the alleged victim went to open the door. The decision that the appellant was found in fragrant delicto was not featured in the evidence.

The reception of electronic evidence there is suspicion or doubt (The print out of the phone) and the investigation of the phones. My Lord, the incidence happened on 23/07/2018. The evidence of Herbet Mwanga on 29 page of the typed proceedings. Under Section 18 of the Electronic Transaction Act, the authority of the messages is low. The witness did not explain further. There is a doubt which has to benefit the appellant. Mr. Mwandoloma elaborated.

On top of that, Mr. Mwandoloma urged in convicting the appellant, the magistrate used the messages and in fragrant delicto and that the appellant failed to cross – examine in respect of sexual encounters. That is weaknesses in the defence which is wrong, Mr. Mwandoloma reinforced.

Mr. Mwandoloma too questioned whether the messages amounted to sexual favours. Criminal trial does not work on speculation. He said they have to prove beyond reasonable doubt. It was wrong for the trial court to believe that the messages amounted to demanding sexual favour. He concluded they see that there are doubts in the prosecution case which has to benefit

the appellant. He cited **Emmanuel Kibona V.R. [1995] TLR 241** as an authority.

With the greatest respect to Mr. Mwandoloma, I do not accept the view that the prosecution did not prove its case beyond reasonable doubt. The appellant too was not convicted on the weakness of his defence. Failure to cross-examine on material fact has been held to be admission of the material fact, see **Shamir John v. Republic Criminal Appeal no. 166 of 2004** (CAT) at Mwanza (Unreported), Rutakangwa, J.A at p.14. Further evidence in defence has been held to advance the prosecution case if the it supports the prosecution case. The authority for this proposition is the case of **Ali s/o Mpaiko Kailu v. R. [1980] TLR 170** Kisanga, J.

As to the registration of the phone that the phone number was registered on 03/05/2020 but the messages from the phone number were sent prior to 23/07/2018. If one looks at exhibit P 9 one will find that the phone was registered in 2015 prior to the offence. Hence what was written by the trial magistrate that the phone number was registered on 03rd day of May 2020 was mere a slip of the pen which cannot assist the appellant.

Next, I consider the 2nd reason for the appeal. This is that the trial District Court magistrate erred in law and fact in convicting the appellant basing on the electronic evidence without satisfying itself as to its collection, handling, storage and admissibility of the said evidence which purports to be the communication between the appellant and the victim via mobile phone and that there is possibility that they may have been tempered with and hence reaching to the wrong decision. This ground of appeal too is lacking in merits. There is more than enough evidence oral evidence from the victim of the offence PW3. The electronic evidence however, is reliable and cogent and PW5 and PW6 are credible witnesses and they gave certification as to authenticity of the electronic print outs which certifications were admitted in evidence as exhibits. The electronic evidence merely corroborated the evidence which was already sufficient. The circumstance in which the appellant was found. His defence too, cements the case of the prosecution.

PW 5 Sonelo investigated the mobiles phones of the victim and the appellant and found gave his report exhibit P8 computer forensic examiner found 57

relevant messages sent between the victim and the appellant clearly show that the appellant was demanding sexual favour so that he makes the victim pass her examination. Further, there are certificates of authentication of electronic print outs by both PW5 and PW6 respectively as exhibit P7 and Exhibit P. 8 The evidence of the experts only corroborates the evidence of the victim herself. The 2nd motive for this appeal by the appellant is flawed and dismissed.

That the trial District Court magistrate erred in law and fact in disregarding the defence case that the victim is the lover to the appellant and thus there is possibility of the victim planning ill motive to the appellant and hence reaching to the wrong decision. This is the subject of the 3th lamentation in the petition of appeal.

The story of the appellant that PW4 was his lover does not add up. If she were his lover, he would have not sent a message to her promising her that if she were his lover, she will never fail. He was recorded saying as follows in cross-examination, "In cross-examination he said, "By telling Beatrice via

sms that "ukiwa na mimi kimapenzi huji kufeli tena mpaka unamaliza masomo" I meant that as tutor I have many means of assisting a student including cancelling and giving her more materials. If words spoken on plea are taken into consideration of the guilty of the accused person, **Safiel Mrisho v Republic [1984] TLR 151** (HC). Then words spoken in defence are taken even seriously, see **R. v. Sebastiano s/o Mkwe, [1972] HCD no. 217 (E.A.C.A.)** SPRY, AG. P.

> *Where the accused chooses to testify, the court may take his evidence into consideration in coming to the conclusion that his guilt has been proved beyond reasonable doubt, and need not confine itself to the evidence of prosecution witnesses.*
>
> *Substantial, the evidence of these witnesses is consistent and the trial magistrate found them to be witnesses of truth. ... Once an accused person has been called on to make his defence, any evidence he gives or calls is evidence in the trial and it is the duty of the court to consider the evidence as a whole.*

See also **Ali s/o Mpaiko Kailu v. R. [1980] TLR 170** Kisanga, J.

I hold that the trial court was justified in finding the appellant guilty of the offence, and convicted him as it did. PW4 is a credible witness and I commend her for reporting the offence. She is a responsible citizen of this country, just as the Court of Appeal of Tanzania did in **Hatibu Ghandhi v. Republic [1996] TLR 12** (CA).

The next justification (5th) for this appeal is that the trial district magistrate erred in law and fact in convicting and sentencing the appellant herein without considering the evidence of the defence to the effect that the case against the appellant has been fabricated because the complainant planned the act against the appellant because she failed in her exams and wondered why her lover (the appellant) failed her and decided to fabricate a case against the appellant and hence reaching to the wrong decision. This lamentation could be discussed together with the 4th ground of appeal as they all allege the case was planned and fabricated

I readily hold that the case was not fabricated. There is cogent evidence on the prosecution side which does away with the possibility of fabrication. This

ground of appeal too is lacking in merits. There is more than enough evidence oral evidence from the victim of the offence PW4. The electronic evidence merely corroborated the evidence which was already sufficient. The circumstance in which the appellant was found. His defence too, cements the case of the prosecution. The 4th and 5th ground of appeal is just an afterthought. As such, they fall flat.

The 6th ground is to the effect that the trial district court magistrate erred in law and fact in believing that the words "Nakutaka wewe mtoto mzuri jamani aah hahahahaha ..." amount to demanding sexual favours and hence reaching to the wrong decision.

I disagree with this argument of appeal. Of course, such words coupled with his revealing the results of PW4 to her prior to the official result being published, reinforced with his admission in defence that he would use more tactics such as counselling and giving her more materials to raise her standard. He was also found in a guest room with PW4 while he was covered only with a bed sheet, ready to accomplish his illegal intention. So, it was

not the words complained of in the 5th cause of the appeal that proved the case against the appellant beyond reasonable doubt. This ground of appeal succumbs.

The 7th motive in filing this appeal to this court was couched with the following words, that the trial court magistrate erred in law and facts in failing to consider that the defence of the appellant and his witness succeeded to raise a reasonable doubt and hence reaching to the wrong decision. The defence did not raise any reasonable doubt, in essence it advanced the prosecution case.

I have avidly deliberated the 7th motive for this appeal and I have reached a conclusion that the same is lame. In actual sense, the defence of the appellant enhanced the prosecution case when the appellant said in his defence, *"By telling Beatrice via sms that "ukiwa na mimi kimapenzi huji kufeli tena mpaka unamaliza masomo" I meant that as tutor I have many means of assisting a student including cancelling and giving her more*

materials. My view is well based on **R. v. Sebastiano s/o Mkwe, [1972] HCD no. 217 (E.A.C.A.)** SPRY, AG. P.

> *Where the accused chooses to testify, the court may take his evidence into consideration in coming to the conclusion that his guilt has been proved beyond reasonable doubt, and need not confine itself to the evidence of prosecution witnesses.*
>
> *Substantial, the evidence of these witnesses is consistent and the trial magistrate found them to be witnesses of truth. ... Once an accused person has been called on to make his defence, any evidence he gives or calls is evidence in the trial and it is the duty of the court to consider the evidence as a whole.*

See also **Ali s/o Mpaiko Kailu v. R. [1980] TLR 170** Kisanga, J.

I advance to the 8th foundation of appeal. That the circumstantial evidence which was relied upon to ground conviction by the trial magistrate was not credible and did not satisfy the three tests. He referred to Sarkar on evidence, 15th Edition 2003 Report Vol. 1 at page 63.

I am unimpressed with this ground of appeal. This is because it was not only circumstantial evidence but also direct oral evidence from witnesses and documentary evidence that proved the case beyond reasonable doubt. The 8th reason of appeal is hand capped and crumbles to the ground.

Next, I turn to discuss the 9th cause for the appeal on the part of the appellant. This is that there was no concrete evidence to show or prove that appellant being arrested in flagrante delicto did amount the whole aspect of favour to the victim.

I have dispassionately considered this ground of appeal and in my view flagrante delicto means found in the act. It does not mean that the appellant ought to be arrested while having sexual intercourse with PW4. The stage of events when arrested, the appellant was in the act of demanding sexual favour, only to be cut shot of reaching his goal. The offence was not only complete but also proved to the required standard of proof in criminal trial further it was not an inchoate offence. All the prosecution ought to prove is his demands for sexual favour, which the prosecution proved. The charge

against the appellant was proved beyond reasonable doubt. This ground fails.

At last, I determine the 10th lamentation in this appeal. That the trial magistrate was wrong in believing against the charge which does not disclose the whole aspect of sexual favour.

The 10th rationale of the appeal by the appellant reminds me of the observation by his Lordship Samatta, in **Samweli Msivangala v. R. [1980] TLR 319 (Samatta, J.) at 320**

> *The law as I apprehend it is that asportation need not involve a long distance. The slightest movement will suffice. The true test is whether every atom in the article being involved had left the place which that particular atom had occupied. I venture to point out, without, I hope, any disrespect, that if the law were as the two courts below took or thought it to be, the man on the UDA omnibus would have been tempted to ask his neighbor: Why has the law parted company with common sense? I have always understood it to be one of the duties of courts of justice to strive, as far as is possible for the non- existence*

of friction between the law and common sense, so that the former may continue to enjoy the respect and obedience of the common man. Hosia Lalata v. Gibson Zumba Mwasote [1980] TLR 154

The 10th ground of appeal, in the totality of the above discussion and authorities I have cited, too deserves to be thrown out and I proceed to do so.

I have dismissed all of the foundations of appeal leveled by the appellant against the conviction and sentence of the appellant. The charge is well established and correct just as I have endeavored to elaborate in detail above.

In the end, the appeal is found to be very weak. With the greatest respect to Mr. Mwandoloma learned senior State Attorney for the Respondent, I am dispassionate with his submissions in support of the appeal. In totality, I am also unmoved by the submissions of the appellant when he was advancing his appeal. This appeal is dismissed. Conviction and sentence are upheld.

It is so ordered.

DATED and signed at SUMBAWANGA this 31st day of August 2021.

J. F. Nkwabi

Judge

Court: Judgment is delivered in open court this 31st day of August, 2021 in the presence of Ms. Safi Kashindi, learned State Attorney for the Respondent, and the appellant present in person. Parties appeared via video conference.

J. F. Nkwabi

Judge

Court: Right of appeal is explained.

J. F. Nkwabi

Judge

31/08/2021