IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
CRIMINAL APPEAL No. 6 OF 2020
(C/f Criminal Case No.321 of 2018 District Court of Rombo at Mkuu)
JEROME PETER KAVISHE@KIDAME.....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

12th July & 23rd August, 2021

JUDGMENT

MKAPA, J.

In the District Court of Rombo at Mkuu (the trial court) the appellant Jerome S/o Peter Kavishe was charged with and convicted of the offence of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code Cap 16 [R.E. 2002] (now R.E. 2019). It was alleged that, on 20th December, 2018 at around 14:30 hours at Momwe Village within Rombo District Kilimanjaro Region, the appellant had carnal knowledge of a male boy aged 8 years against the order of nature whom I shall conveniently be referring him as the victim or "**JT**",.

The appellant pleaded not guilty to the offence and trial ensued, involving six prosecution witnesses and two defence witnesses.

At the trial court, the allegation of the prosecution was that the victim JT was sent by his Aunt Anita to pick his young nephew one Lightness. On his way, he met with the appellant who asked the victim to follow him to his house. While in the house the appellant started caressing his private parts, undressed him while forcing him to bend. He also undressed himself and inserted his penis into the victim's anus. That, when the victim raised alarm for help the appellant threatened to kill him with a bush knife and also threatened him not to reveal to any other person. It was further alleged that the incident continued on several occasions. This piece of evidence was corroborated by other prosecution witnesses including PW5, a medical doctor whose medical examination report confirmed that the victim was penetrated against the order of nature as he sustained bruises. In his defence, the appellant denied to have committed the offence and claimed that the case was framed against him since he had grudges with Mama Light. At the end of the trial, the appellant was found guilty, convicted and sentenced to serve life imprisonment. Aggrieved by the decision of the trial court the appellant filed this appeal raising nine (9) grounds which can be summarized into the following six grounds as some carry the same substance;

1. That, the trial magistrate erred in law and fact in failing to note that PW3 was unreliable as he stated that he felt pain

on the day of the incident, while at the same time he claimed the act was repeatedly performed with another boy named Gilbert who was not brought to testify.

2. That, the trial magistrate erred in law and fact in relying on PW5's testimony that the victim was penetrated by a blunt object like penis while there is a possibility of other blunt objects like fingers that might have penetrated the victim.
3. That, the trial magistrate erred in law and fact in failing to note that PW1 testified that she saw the victim sitting on appellant's laps outside while naked which raised some doubts as to whether the incident did actually occurred.
4. That, the trial magistrate erred in law and fact in failing to analyze appellant's defence testimony that he was charged with the offence because he had grudges with the victim's mother.
5. That, the trial magistrate erred in law and fact in failing to comply with section 210 (3) of CPA.
6. That, the trial magistrate erred in law and fact in holding that the prosecution proved their case beyond reasonable doubt hence wrongly convicted the appellant.

On hearing of the appeal parties prayed for the same to be disposed of by way of filing written submission and the leave was granted. The appellant appeared in person and fended for

himself while Mr. Ignas Mwinuka, learned State Attorney appeared for and represented the respondent.

Supporting all grounds of appeal as were all centered in challenging the prosecution for failure to prove their case at the required standard, the appellant randomly submitted that, the victim was not credible nor reliable for his testimony to be relied on. That, on page 12 of the trial court's typed proceeding, the victim testified the fact that he felt so much pain and cried for help but later testified that the appellant repeatedly performed the same act. He contended that, for a child aged 9 years it was impossible for the victim to endure such pain yet continued to perform the act. In support of his contention he relied on the case of **Hamis Halfan Daudi, Criminal appeal No. 231 of 2009** in which the court observed that, it is a position of law that best evidence in sexual offence comes from the victim but such evidence should not be accepted and believed like a gospel truth, rather the reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate innocent person, therefore the victim's evidence should be considered and treated with great care and caution. The appellant went on submitting that the trial magistrate failed to comply with section 210 (3) of the CPA which provides that;

"The Magistrate shall inform each witness that he is entitled to have his evidence read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."

It was the appellant's view that since the aforementioned legal requirement was not fully complied, the case was not proved to the required standard due to non- compliance with the procedure in conducting criminal matter. The appellant contended further that a valid judgment has to provide sufficiently and plainly reasons to justify the findings. Thus, in the present appeal, the trial magistrate not only failed to comply with the said requirement but also failed to assign reasons for arriving at her decision. He went on arguing that the same prejudiced his rights.

Finally, he submitted that, in criminal cases the burden of proof is beyond reasonable doubt and that burden never shifts throughout the trial. As such, the quality of the prosecution evidence ought to be watertight to warrant conviction of an accused person and not the quantity of the prosecution witnesses. He finally prayed for the Court to allow the appeal, quash the conviction and sentence and set him at free.

Responding, Mr. Mwinuka vehemently opposed the appeal and submitted on the issue of credibility of the victim PW3 that, it is

cardinal principle of the law that, credibility of a witnesses is monopoly of the trial court. That, the evidence of PW3 was well corroborated by testimonies of PW1, PW5 and exhibit P1. He further submitted that due to cogent evidence adduced by the prosecution, the same was cogent to warrant conviction. As to the requirement of section 210 (3) of the CPA the Learned State Attorney argued that, non-compliance of the same does not render the trial nullity. He placed reliance on the decision in the case of **Yuda John V. Republic, Criminal Appeal No. 238 of 2017** CAT (unreported), In which the Court analyzed the issue of non-compliance of section 210 (3) of CPA whether did prejudice the appellant to the extent of occasioning miscarriage of justice. That, the Court observed that such omission is curable under section 388 of CPA. Thus it was Mr. Mwinuka's view that the same applies to the appeal at hand as the appellant failed to prove how he was prejudiced.

Lastly, the learned State Attorney submitted that the appellant had raised the issue of non-compliance with section 312 (1) of the CPA by the trial magistrate. The Learned State Attorney vehemently opposed the same as misplaced, since at page 8 of the trial court's typed judgment the trial magistrate did assign reasons why she believed in the prosecution evidence. He finally prayed for this court to dismiss the appeal and uphold the trial

court's judgment. In his brief rejoinder, the appellant reiterated his earlier submission and maintained his innocence.

Having considered parties submissions and carefully perused the trial court's record, the only question that arises is whether the prosecution case has been proven beyond reasonable doubt to ground conviction against the appellant.

Considering the manner in which I intend to deal with this appeal I shall begin with determining the 1st, 2nd, 3rd, 4th and 6th grounds jointly, followed by the 5th ground separately which will address on the is of compliance with the procedure under section 210 (3) of the CPA.

On the issue on credibility of PW3's testimony raised by the appellant, I may refer at this juncture some judgment of the Court of Appeal. In **Shabani Daudi V R. Criminal Appeal No. 28 of 2000**, the Court of Appeal observed;

> *"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. 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 person.*** *In these*

two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court." ***(emphasis added)***

In the case of **Crospery Ntagalinda @ Koro V. The Republic, Criminal Appeal No. 312 of 2015**, CAT- Bukoba (unreported), the Court of Appeal stated:

"Every witness is entitled to credence and his testimony believed unless there are good and sufficient reasons for not believing the witness."

The victim's enumeration of event is plain clear at page 11 and 12 of the trial court's typed proceedings where he stated that;

"On 20/12/2018 at 14hrs, I was sent by aunt Anita to collect Lightness. I went but I didn't reach where light was as Jerome called me to his house he was alone so I went in his house, he touched my buttocks and my penis, then he took off my short pens and told me to bend he took off his clothes too and took his penis and entered my anus, the penis was big like a stick. I felt so much pain and cried he told me to keep quiet, inside his house there was a table, a bed, he did it 'amepiga magoti' I bend while I was doing we went outside to the bench."

The aforesaid victim's testimony no doubt proved penetration which is essential element in rape offence. The victim's testimony was corroborated by other prosecution witnesses including PW1 (victim's aunt). The testimonies were direct, coherent and the appellant never raised doubt as to why PW1's testimony shouldn't be trusted. I find it necessary to reproduce the relevant part of PW1's testimony at page 9 of the typed proceedings, when she stated;

> *"On 20/12/2018 at 14:30hrs I was at home I send Raymond to call Lightness from Mama Gift, he went but didn't come back for 30 minutes, I decided to follow him, on my way, I saw Raymond on thugs (mapaja) of Jerome it was at Jerome's home they were seated on a bench, I went closer and saw Raymond's shorts pens down to his feet's and was naked at Jerome's thugs"*

The above testimony sufficiently corroborates that of the victim's when he testified the fact the appellant carnally known inside the appellant's house then they shifted outside and seated on the bench. Although the appellant claimed the case to have been framed against him because he had grudges with the victim's mother, he failed to prove the same which in my opinion is nothing less than an afterthought. As to the ground that the

victim's testimony was contradictory as to how a 9 years boy could endure such pain on the day of the ordeal and yet he alleged the appellant to have repeatedly carnally known him after the day of the incident. This argument is misplaced. This is a serious evil. It doesn't matter whether the victim felt pain during the act or otherwise. More so, it is not an essential element in proving unnatural offence. Additionally, I do not see any reason why the victim would lie against the appellant for this court to consider his testimony untrustworthy. PW5's (doctor's) testimony being an expert corroborated the fact that the victim was indeed penetrated by a blunt object like a penis. Appellant's argument that the victim might have been penetrated by other objects is baseless.

It is well settled in numerous judicial authorities of Court of Appeal that the best evidence in rape offence comes from the victim. This position is affirmed in **Selemani Makumba V Republic** [2006] TLR 380 where the Court of Appeal held *inter alia*;

> *"True evidence of Rape has to come from the victim if an adult, that there was penetration and no consent,"*

On the basis of the aforementioned analysis, I am satisfied that the evidence adduced by PW3 (the victim) was cogent to warrant conviction against the appellant.

Turning to the second argument that the trial magistrate failed to comply with section 210 (3) of CPA. The section reads;

> *"(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence"*

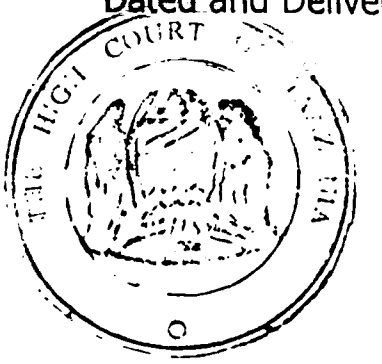
The use of the word "shall" connotes mandatory requirement and non-compliance by the trial magistrate is fatal. However, the one to prove how the omission prejudicially affected the appellant lies on the appellant himself. In the present appeal, as rightly submitted by the respondent, the appellant has failed to prove how non-compliance of section 210 (3) had prejudiced him since the omission is curable by section 388 of the CPA as was held in the case of **Flano Alphonce Masalu @ Singu V Republic, Criminal Appeal No. 366 of 2018** (unreported).

Considering the submission of the parties, trial court's record and the facts as discussed above, I found no ground to fault well considered and well analyzed judgment of the trial court.

In the event, I dismiss this appeal and upheld the decision of the trial court.

It is so ordered.

Dated and Delivered at Moshi this 23rd August, 2021.



S.B. MKAPA
JUDGE
23/08/2021