IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 54 OF 2020

(Originating from the District Court of Babati, Criminal Case No. 49 of 2019)

BOAY BURA .....APPELLANT

VERSUS

THE D.P. P.....RESPONDENT

JUDGMENT

27/5/2021 & 9/7/2021

ROBERT, J:-

This is an appeal against the decision of the District Court of Babati in Criminal case No. 49 of 2019 delivered on 26th day of November 2019. The appellant, Boay Bura was charged and convicted for committing unnatural offence contrary to section 154 (1) (a) and (2) of the penal Code, Cap. 16 (R.E 2002). He was sentenced to life imprisonment together with four (4) strokes to be inflicted on his buttocks.

The prosecution case alleged that on 23rd day of January, 2019 at Moyamayoka Village, within the District of Babati in Manyara Region, the appellant did have carnal knowledge of one Joseph s/o Andrea a boy aged seven years old against the order of nature.

The victim was allegedly sent by his mother on the evening of the material day to buy some milk. On the way he met the appellant who held his hand, took him into the bush, undressed him and forced his penis into the victim's anus. The victim shouted with pain and some people responded and rescued him but they failed to apprehend the appellant who escaped.

The rescuers took the victim to his mother, then they reported the incident at the Police station and later the victim was taken to the Health Center for medical examination. After examination, the doctor found bruises and sperms in his anal. The appellant was arrested and charged with the offence of unnatural offence.

During trial, the appellant denied to have committed the offence of unnatural offence and in his testimony as DW1 he testified that Pauline Joseph (PW5) fabricated a case against him due to their previous land disputes. Having been convicted and sentenced, the appellant appealed to this court armed with three grounds of appeal to the effect that:

1. *That, the learned trial magistrate erred in law and in fact by failing to comply with the mandatory requirements of section 228 of the CPA Cap. 20 R.E. 2002.*
2. *That, the learned trial magistrate erred in law and in fact when he failed to scrutinize and evaluate the evidence on record.*

3. *That, the learned trial magistrate erred in law and in fact to enter a conviction while the offence was not proved beyond reasonable doubts.*

In the course of this appeal the appellant lodged five additional grounds of appeal which, though not easily comprehensible, reads as follows:

1. *That the learned trial Magistrate erred both in law and fact to convict and to sentence the appellant based on contradicted evidence of prosecution witnesses especially on the eye witness who took the victim (PW2) from the scene of crime to his home/ her mother i.e. PW1, PW2, PW3 and PW4 evidences, were unreliable and contradictory testimonies (evidence)*
2. *That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant when he failed to consider with the appellant's defence on making the conclusion on his judgment.*
3. *That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant after the magistrate misdirected himself on believing that ZEBEDAYO DAUDI was the one who took the victim from the scene of crime to his victim's mother while the said mother (PW3) testified that the was DISMAY ZEBEDAYO who sent the victim and inform her on the allegation accident, also the victim himself on his words before the court testified that, were the people who took him from the scene of crime and sent him to his mother and not ZEBEDAYO DAUDI as PW4 testified before the Court.*
4. *That, the learned trial magistrate grossly erred both in law and fact after failing to note that, there was delaying time of taken the victim (PW2) to hospital i.e. the alleged accident occurred on 23/01/2019 at*

12:00 in the noon, but the PF3 was issued on 24/01/2019 according to (PW1) police investigator and the doctor attended the victim on the same date. This raises some doubts and left same matters unresolved, hence wrongly conviction and sentence to the accused now the Appellant.

5. *That, the learned trial magistrate erred in law and fact to convict and sentence the appellant based on PW4 evidence (eye witness) while the said witnesses did not even describe the accused i.e. the acussed's appearance, his other names, his other resident and how he knows the accused now the appellant, out of only mentioning one name of BOAY while the people with BOAY name are so many in the world, this shows exactly the case was planted to the appellant.*

At the hearing of this appeal, the appellant appeared in person without representation whereas the Respondent was represented by Mr. Ahmed Hatibu, learned state Attorney. Hearing proceeded orally.

Submitting on his grounds of appeal, the appellant abandoned his first ground of appeal and proceeded to submit on the remaining two grounds of appeal filed in his first petition of appeal and the five additional grounds lodged on 8/4/2021. For comfort of reference, the two remaining grounds will be renumbered as grounds no. 1 and 2 respectively and the five additional grounds will form part of this numbering as grounds no. 3 to seven respectively.

Highlighting on the first ground, he argued that, the testimony of PW2 does not support the charge sheet in respect of the scene of crime.

He clarified that, while the charge sheet stated that the incident took place at Mayomayoka, Pw2 said the event took place at Mayoka. He maintained that, by this difference the prosecution failed to prove their case.

On the second ground, he argued that, at the preliminary hearing and the in the charge sheet the name of the victim appeared as Joseph Andrea while the person who came to testify before the court was Joseph Andrea Bura (Pw2).

On the third ground, he stated that, the prosecution evidence at the trial court was marred with contradictions. He maintained that PW4 who was an eye witness informed the court that he took the child to his mother whilst PW3 (the victim's mother) stated that it was Dismass Zebedayo who informed her about the incident.

Arguing the fourth ground, he submitted that, his defence were not considered at the trial court and there is nowhere in the impugned judgment where the trial magistrate indicates reasons for neglecting his evidence (See page 3-5).

On the fifth ground, he argued that, the trial court was misdirected that it was Zebedayo Daudi who took the victim home while Pw3 said it was Dismay Zebedayo. He maintained that, even the victim (Pw2) did not mention the name of the person who took him home after the incident.

On the remaining grounds, that is the 6th and 7th grounds, which appears as the 4th and 5th grounds in his additional grounds, prayed that they should be adopted as they appear in the petition of appeal.

In response, Mr. Hatibu, Counsel for the Respondent, resisted this appeal and supported both conviction and sentence imposed to the appellant.

Submitting on the first and second grounds together, Mr. Hatibu argued that the difference in the names of the scene of crime as appearing in the charge sheet and that of witnesses is minor and curable under section 388(1) of the Criminal Procedure Act Cap (R.E 2002). He maintained that, the name mayoka used by PW2, PW3 and PW4 and the name Mayomayoka used in the charge sheet are the same, the difference is in the pronunciation and it is curable as it is minor. He argued further that, since the appellant didn't ask questions regarding the alleged difference of names of the scene of crime it means he understood the area where the alleged crime took place. He refereed the court to the case of **Ally Ramadhan Shekindo and Another vs The Republic**, Criminal Appeal No. 332 of 2017, CAT (unreported) to support his argument.

With respect to the differences in the names of the victim, Joseph Andrea appearing in the charge sheet, and Joseph Andrea Bura who testified as PW2, he submitted that, both names represent the same person except that in one circumstance he used his two names while in the other circumstance he used his three names. He maintained that this is a minor difference and it is curable under section 388 of the Criminal Procedure Act, Cap. 2002 (R.E. 2002).

He argued further that, the prosecution managed to prove their case beyond reasonable doubt at the trial court that the victim was defiled. The evidence of PW2 (the victim) was corroborated by that of PW5 who showed that the victim had bruises in his anus. Pw2 mentioned the appellant as the one who committed that offence, he was a person known to the victim. He argued that, according to section 127 (6) of the Evidence Act, Cap. 6 R.E 2002 the evidence of PW2 (the victim) was capable of establishing a case against the appellant.

Coming to the third ground, he submitted that, the minor confusions of the names Dismay Zebedayo and zebedayo Daudi, does not go to the root of the case as it did not affect the fact that the victim was defiled. He stated that, evidence of PW4, Zebedayo Daudi shows that he is the same person referred to by PW3 as Dismay Zebedayo. He maintained

that, the testimony of all witnesses was the same in substance and it had no contradiction.

On the fourth ground, Mr. Hatibu was in agreement with the appellant that Hon. Magistrate failed to analyze the defence evidence after raising issues in the case. However, he maintained that, this cannot change the findings and conviction of the appellant. This court, as the first appellate court is vested with powers to analyse the said evidence and come up with a finding and a decision. He referred the Court to the case of **Leornald Mwanashoka vs Republic**, Criminal Appeal No. 126/2014, CAT at Bukoba to support his submissions.

On the fifth ground which was the same as the first ground, he argued that, failure of the victim to mention the name of the person who took him home does not alter the fact that he was defiled. His evidence was corroborated with that of Pw4 who took him home and Pw3, mother of the victim.

Arguing the sixth ground, he maintained that, based on the evidence of the victim, the event took place on 23/1/2019 after the event he was taken home and the following day he was taken to hospital which was less than 24 hours. The Doctor (PW5) testified that he examined the victim on 24/1/2019. Thus, there is no merit in this ground.

On the last ground which is based on identification. He argued that, both PW2 and PW4 identified the appellant and mentioned him during trial. They knew him before the event took place and at that evening there was light, thus, there is no possibility of mistaken identity.

Mr. Hatibu prayed for the appeal to be dismissed and the decision of trial court be upheld.

Having presented in a nutshell what transpired during trial and in this appeal, this Court is now in a position to determine the merit of this appeal in the light of issues raised in the grounds of appeal lodged in this Court. This appeal raises four critical questions for determination of this matter as follows: **One**, whether the inconsistency and contradiction raised by the appellant goes to the root of the matter; **two**, whether the accused person was properly identified; **three**, whether there was a delay in taking the victim to hospital; and **four**, whether the defence evidence was considered by the trial court.

Starting with the first issue, the appellant mentioned three contradictions noted in the prosecution evidence. **Firstly**, that the victim had two names, Joseph Andrea as portrayed in the charge sheet and Joseph Andrea Bura as portrayed in the proceedings. **Secondly**, that there were two different names for the scene of crime, one is Mayoka and

the other one is Mayomayoka as it can be seen in the charge sheet and in the trial court proceedings. **Thirdly**, that Pw3 said the person who informed him about the incident was Dismass Zebedayo whilst Pw4 (Zebedayo Daudi) said he was the one among the persons who took the victim home.

Mr. Hatibu is of the view that those are minor contradictions which do not go to the root of the case as they can be cured under section 388 (1) of the CPA. He also observed that, the appellant did not raise these issues at the trial Court and further that, the difference of names cannot change the fact that the appellant was found guilty of the offence charged.

Having gone through the impugned judgment it is clear that, the learned magistrate did not make reference to these contradictions nor did he make a mention of them. That was wrong, it was the duty of the Court to consider the inconsistency and contradictions in the body of evidence adduced, try to resolve them and decide whether the contradictions were only minor or they go to the root of the matter.

It is a principle of law as indicated in the case of **Chrisant John vs The Republic**, Criminal Appeal No. 313 of 2015, CAT at Bukoba (unreported) where the court held inter alia, that:

"We wish to state the general view that, contradiction by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions it must always be remembered that witnesses do not make a blow by blow mental recording of the incidents. As such contradictions should not be evaluated without placing them in their proper context in an endeavour to determine their gravity, meaning, whether or not they go to the root of the matter or rather corrode the credibility of a party's case".

Citing the case of **Dickson Elias Nsamba Shapwata & Another v. Republic**, Criminal Appeal No.92 of 2007, the Court of Appeal further held that;

"In evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter"

Considering the nature of contradictions flagged by the appellant, this court finds that calling the victim by his two names as opposed to calling him by his three names do not change who he is as long as he

didn't reject the said names and there is no evidence to establish that the said names makes reference to a different person apart from the said victim. Similarly, the alleged differences in naming the scene of crime either as "Mayomayoka" as stated in the charge sheet or "Mayoka" as stated by witnesses may be caused by differences in pronunciation as alleged by counsel for the Respondent or otherwise but of importance is that the description given by witnesses about the location of the place they are referring to has no contradictions. As for the names of the person who informed PW3 about the incident, this Court holds that, there is no evidence to establish that the names Dismass Zebedayo and Zebedayo Daudi refers to different persons. Pw3 could have named it improperly but Pw4 himself corrected his name. For reasons stated, this court finds and holds that, the alleged contradictions do not affect the central story of the prosecution nor affect the credibility of the witnesses and are hereby considered as immaterial.

Further to that, since the appellant did not raise this issue or cross examine the witnesses in respect of the place where the alleged event took place at the trial of thought, he is estopped from raising that issue at this stage (See **Ally Ramadhani Shekindo and Another vs The Republic**, Criminal Appeal No. 532 of 2017 CAT (Unreported).

Coming to the second issue, the appellant alleged that he was not properly identified at the trial court simply because Pw4 did not describe him, mention his other names and mention his other places of residences.

In **Mohamed Alhui v. Rex** [1943] 9 EACA 72 the erstwhile East African Court of Appeal stated categorically that;

> *"In every case in which there is a question as to the identity of the accused, the fact of there, having been a description and terms of that description, are matters of the highest importance of which evidence ought always to be given first of all, of course, by the person who gave the description or purports to identify the accused and then by person to whom the description was given."*

It is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give detailed description of such a suspect to a person whom he first reports the matter to before such a suspect is arrested.

The Court in **Waziri Amani v. Republic** [1980] TLR 250 state the following conditions to be taken into account;

> *"...the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such*

observation occurred, for instance, whether it was day or night time; whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."

In the instant case, the incident took place at noon in a broad daylight and, as indicated above, at the trial court Pw4 witnessed the appellant sodomizing the victim (PW2). Even though PW4, did not give proper description of the appellant in respect of his other names or clothes he wore on that day, the fact that, there was a good light at the scene, and they knew the accused before the incident that alone eliminate all the possibilities of mistaken identity. Thus, I am of the settled view that the identification was watertight.

On the third issue, the appellant alleges that prosecution was late on taking the victim to hospital. In rape cases it is vital to examine the victim of rape as early as possible. According to the evidence, the victim was raped on 23/1/2019 at 12:00HRS (noon) and the Medical Examination Report indicates that she was examined on 24/1/2019 AM. Although the Doctor (Pw5) did not mention the exact time of examination but the use

of the term "AM" means examination was done prior to 12:00 Hours on 24/1/2019 which means the victim was examined within 24 hrs. Hence, there is no delay as alleged by the appellant herein.

Lastly, the appellant alleged that the trial court did not consider his evidence in the impugned judgment. Failure to consider defence evidence is considered to be a serious misdirection on the part of the trial Court. In the case of **Hussein Iddi and Another vs Republic** [1986] TLR 166, the Court of Appeal of Tanzania observed and held that:

> "*It was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence.*

It was also held in the case of **Leonard Mwanashoka vs Republic** Criminal Appeal No. 226 of 2014 (unreported), cited in **Yasini S/O Mwakapala vs the Republic,** Criminal Appeal No. 13 of 2012, that;

> "*It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper*

scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis.

The Court in **Leonard Mwanashoka vs Republic** (supra) went on to hold that:

"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice. It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."

In the present case, it is clear that the trial magistrate dealt mainly with the prosecution evidence in arriving at a conclusion (See page 3-5 of the trial court judgment). The magistrate at page 3, second paragraph did summarize the defence evidence but as said in the case of **Leonard**

Mwanashoka (supra), it is one thing to summarize the evidence and another thing to evaluate it. For that reason, I will proceed to analyse the evidence adduced at the trial Court and come up with a decision.

At the trial court, it was the evidence of PW2 (the victim) that, he was sent by his mother to buy some milk, on the way he met the appellant herein who drove him into the bush and had carnal knowledge of him against the order of nature. He shouted and people responded including PW4, they took him to his mother and informed her what happened. Thereafter, he was taken to police station then to hospital where after examination PW5 revealed that he saw bruises at the inner party of the anus and around the thighs. He remarked that, a blunt object penetrated into PW2's anus. While on oath, PW4 added that, he saw the appellant sodomizing the victim but the Appellant managed to escape before he could catch him and even PW2 identified the appellant as they used to live in the same village.

The defence case was very short. The appellant testified as DW1 and testified that:

> *"I did not do that. PW5 did not identify his office. The case took long time I wonder why Pauline Joseph I had previous quarrel with land that is why the case was fixed to me."*

The defence case basically alleged that the case against the appellant is a fabricated case because of previous quarrels between the appellant and Pw3 (Pauline Joseph) over a piece of land. When asked why he did not cross examine PW3 with regards to the said quarrels, he said that at that time it was difficult to establish it.

As a general rule the burden of proof in criminal cases lies on the prosecution side (See Sections 3 (2) (a) and 110 (1) of **The Evidence Act**, Cap. 6, R.E 2019.) This position was also held in the case of **Jonas Nkinze Vs Republic** [1992] T.L.R 213, that;

> "*The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution; is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking*"

The same principle was repeated in the case of **Joseph John Makune Versus The Republic** [1986] T.L.R 44, were the court held;

> "*The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence*".

The prosecution has a noble duty to establish a prima facie case and prove the offence against the accused beyond reasonable doubt. In the present case, based on the evidence adduced at the trial court, this Court is satisfied that the prosecution proved their case beyond reasonable doubt. The defence as explained by the appellant (accused person by then) did not shake the prosecution's case. The appellant had no evidence to prove the alleged quarrel between him and Pw3 which he alleged that caused him to be fixed with this case. Thus, this court finds and holds that, the prosecution proved the commission of unnatural offence contrary to section 154 (1)(a), (2) of the Penal Code.

In the end, this Court finds that this appeal has no merit and proceeds to dismiss it in its entirety. The conviction and the sentence of the trial court will remain undisturbed.

It is so ordered.

K.N.ROBERT
JUDGE
9/7/2021