IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB REGISTRY

AT IRINGA

DC. CRIMINAL APPEAL NO. 88 OF 2022

(Originating from Criminal Case No. 103 of 202I in the District Court of Iringa at Iringa)

RAMADHANI MUSA CHEWA---------- APPELLANT

VERSUS

REPUBLIC---------- RESPONDENT

JUDGEMENT

Date of Last Order: 20/03/2023

Date of Judgment: 06/04/2023

A. E. Mwipopo, J.

The appellant namely Ramadhani Musa Chewa was charged and convicted by the Iringa District Court for unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2019. It was alleged in the particulars of the offence that on 4th April, 2020, at Mbuyuni – Mpolipoli area, within Pawaga Ward and Iringa Rulal District, the appellant unlawfully had carnal knowledge of HM (the name of the victim is

concealed), a girl of 12 years, against the order of nature. After hearing prosecution and defense witnesses, the trial court convicted the appellant for the offence charged and sentenced him to serve life imprisonment. It also ordered the appellant to pay Tshs. 10,000,000/= as compensation to the victim.

The appellant was aggrieved by the decision of the District Court and filed the present appeal. In his petition of appeal, the appellant has raised a total of seven grounds of appeal as provided hereunder:-

1. *That, the learned trial Magistrate erred in law and fact to convict the appellant based on PW1 evidence that she did make an alarm and Baraka came to help her without considering that Zuhura and Madelina who were in the same room remained sleeping while the alarm was raised. This raises some doubts if the incident real happened.*
2. *That, the learned trial Magistrate erred in law and facts to convict and sentence the appellant based on PW1 and PW3 testimony without bringing Baraka, who was present when PW1 was making an alarm, to testify before the Court since the evidence of PW2 and PW3 was hearsay evidence which is not accepted by the law.*
3. *That, the learned trial Magistrate erred in law and facts relying on contradictory evidence adduced by PW1 (victim) who said that the accused inserted "dudu lake" at her anus without the prosecution*

side to ask her the meaning of the term "dudu lake" which makes more doubts that the charged offence was wrongly charged.

4. *That, the learned trial Magistrate erred in law and facts relying on the PW1's evidence and convicting the appellant for the offence of unnatural offence while PW1 failed to define the term "dudu" hence the judgment was wrongly entered due to the facts that the term "dudu" is used in many things and it does not means a penis at all.*
5. *That, the learned trial Magistrate erred in law and facts to convict and sentence the appellant on the offence charged while the charge was defective enough when PW1 was silent to define the term "dudu" if it means penis.*
6. *That, the learned trial Magistrate erred in law and facts to convict and sentence the appellant without considering defense side evidence.*
7. *That, the prosecution's side failed totally to prove the case against the appellant beyond a reasonable doubt.*

On the hearing date, the appellant was present in person, whereas, the respondent was represented by Ms. Radhia Njovu, State Attorney. The Court invited the appellant to make his submission. Being a lay person, he prayed for the Court to consider all grounds of appeal in his petition of appeal and that after the State Attorney has replied he will make his rejoinder.

In her reply, the counsel for the respondent opposed the appeal. She submitted jointly on the first and second grounds of appeal where the

appellant alleges that the trial court erred to convict the accused person relying on the testimony of the victim who said that after the incident she called for help, but those who are said to come to help did not come to testify and the remaining prosecution witnesses' testimony is hearsay evidence. It was her submission on these two grounds that in sexual offences the best evidence is that of the victim. The court rightly convicted the appellant based on victims (PW1) testimony. PW1 evidence was supported by the testimony of PW2, PW3 and PW5. PW1 named Baraka to be the person who come to help her after she screamed for help. However, the said Baraka was not eye witness. When Baraka came he found the incident has already occurred and the victim was out of the house crying. The said Baraka did not have heavier evidence than that of the victim. It is the victim's testimony which is supposed to prove the offence as it was held in the case of **Seleman Makumba vs. Republic [2006] TLR 384**. Moreover, Section 143 of the Evidence Act does not provide the number of witnesses who are needed to prove the offence. What is important is credibility of the witnesses. This was stated by the Court of Appeal in the case of **Yohanis Msigwa vs. Republic (1996) TLR 148**. Thus, the 1st and 2nd grounds of appeal have no merits.

The counsel submitted jointly on the 3rd, 4th and 5th grounds of appeal. In these grounds of appeal the appellant alleged that the victim's evidence did not prove that there was penetration because of the use of the word "dudu" by the victim which its meaning was not provided by her. It was her submission that the victim said in her testimony that the appellant inserted his "dudu" in her anus after he wet her anus" with saliva. This is seen at page 6 of the typed proceedings. The victim (PW1) was the child of 12 years during the incident. Due to her age, it is not expected for her to say it directly that accused penetrated his penis into her anus. The use of word "dudu" was proper as both the court and the appellant did understood what the victim meant. The appellant did not cross examine the victim in this aspect which means that he did understood what the victim was saying. Appellant did not cross examine the victim at all which means he admitted what was testified by the victim

In the case of **Haruna Mtasiwa vs. Republic**, Criminal Appeal No. 216 of 2018, Court of Appeal of Tanzania, at Iringa, (unreported), where at page 19 it held that given the age of the victim it was not expected she would graphically tell the trial court that the appellant inserted his penis in her anus. The act of victim to refer to the penis as "dudu" was sufficient. In

the case **of Joseph Leko vs. Republic,** Criminal Appeal No. 124 of 2013, Court of Appeal of Tanzania, at Arusha, (unreported), the Court of Appeal mentioned several instances making the victim to fail to call direct the penis by its name and use other name. Even the court sometimes fails to name or mention the act of the penis to enter inside the anus. Thus, the 3rd, 4th and 5 grounds of appeal has no merits.

Regarding the 6th ground of appeal that the trial court failed to consider appellant's defense, it was her submission that appellant denied to commit the offence in his defense. He said the case was fabricated by his sister following the presence of dispute over the ownership of the land between them. It is correct that the trial court did not consider this evidence by the appellant in his defense. However, the said defense was raised later on the case. Appellant's sister testified as PW2, but appellant did not ask her any question. Since the trial court failed to consider appellant's defense, this Court has to wear the shoes of the trial court to evaluate the whole evidence including the appellant's defense and find that the defense does not establish any doubt in prosecution case. This Court has the power to re-evaluate the defense case and make its decision. This was done by the Court of Appeal

in the case of **Prince Charles Junior vs. Republic**, Criminal Appeal No. 250 of 2014, Court of Appeal of Tanzania, at Mbeya, (unreported).

On the appellant's last ground of appeal that the prosecution failed to prove their case without doubt, the counsel for respondent said in her submission that the prosecution proved their case without any doubt. PW1 who is the victim of the offence testified how the appellant did penetrated him by using his penis against the order of nature. PW1 testimony was supported by the testimony of PW2, PW3 and PW5 plus one exhibit. The victim was credible witness and before he made his testimony, he did take oath. The appellant was identified. The victim and the appellant are relative and the incident took place during a day time. From all this evidence, the prosecution proved their case without doubt. Thus, this last ground of appeal have no merits.

In his rejoinder, the appellant said that the trial court erred to convict him by relying on the testimony of PW1 while she claimed that when the incident occurred there was some people around. This raises doubt to prosecution case. PW2 and PW3 evidence is hearsay. The trial court did not call as PW1 to explain the meaning of "dudu lake" when she testified. The word "dudu" has so many meanings. The trial court did not consider his

defense evidence as result the trial was a nullity. In totality the prosecution evidence was weak and failed to prove the offence without doubt.

Having heard submissions from both parties and the evidence in record, the issue for determination is whether this appeal has merits.

All seven grounds of appeal of the appellant are based on the claims that the prosecution failed to prove the case against him beyond a reasonable doubt. In the 1st and 2nd grounds of appeal the appellant alleges that the trial Court erred to convict him based on testimony of PW1 who said that she made an alarm and Baraka came to help her, but the said Baraka or Zuhura and Madelina who were sleeping in the same room when the incident occurred were not called to testify in support of PW1's evidence.

As it was submitted by the Counsel for the respondent, the evidence in record shows that PW1, who is the victim of the crime, testified that on 04.04.2020, she was sleeping in the bedroom with her young sisters namely Zuhura and Machelina when the incident occurred. The appellant person who is her uncle entered in the room, took off PW1's clothes, he took off his clothes, he put some clothes in her mouth and he inserted his penis in her anus. Before inserting the penis into PW1's anus, the accused did wet her

anus with saliva. PW1 said she felt pain when appellant was inserting his penis inside her anus and she started to cry. The accused person did run to the toilet. PW1 went outside the house crying. Baraka came and found PW1 outside the house crying. She told Baraka that it was the appellant person who did sodomized her and that he run to the toilet after the incident. Baraka went to the toilet and found accused person hiding inside the toilet.

From this evidence, Baraka was the person who come to help PW1 after she screamed for help and she told him that appellant did have carnal knowledge of her against the order of nature. However, the said Baraka was not eyewitness. Looking at the evidence available, when Baraka came he found the incident has already occurred and the victim was out of the house crying. The said Baraka could have a good evidence as the 1st person whom the victim informed about the incident and mentioned the appellant as the person who did sodomized her. Moreover, the evidence of PW1 shows that at the time of incident Zuhura and Machelina were still asleep. Before he sodomized her, appellant put clothes into her mouth. This means that during the incident she could not scream or make noise. It was after he inserted his penis and she felt pain when she took off the clothes from her mouth and started to cry. She said that after she cried appellant run to the toilet.

Also, Zuhura and Machelina did wake up. It is obvious that Zuhura and Machelina did not see the incident as they did wake up after PW1 cried. What they witnessed is the PW1 crying. The evidence of Zuhura, Machelina and Baraka could be good, but it is not heavier than that of the victim. It is the victim's testimony which is supposed to prove the offence as it was held in the case of **Seleman Makumba vs. Republic,** (supra). It is a position of the law that no specific number of witnesses is required to prove the offence according to section 143 of the Evidence Act, Cap. 6 R.E. 2019. What is important is credibility of the witnesses as it was stated by the Court of Appeal in the case of **Yohanis Msigwa vs. Republic [1996] TLR 148.** PW1 appears to be credible and there is nothing record to make this court doubt her credibility.

The evidence by PW1 proved that she was aged 13 years old during the time of the incident, hence she was below 18 years of age. Also, she proved that there was penetration of appellant's penis into her anus. She said that after the appellant inserted his penis into her anus she felt pain. This evidence of PW1 proved the offence of unnatural offence against the appellant. Thus, the 1st and 2nd grounds of appeal have no merits.

The appellant in the 3rd, 4th and 5th grounds of appeal is challenging the PW1 evidence of penetration that she said appellant inserted "dudu lake" into her anus without providing the meaning of the term "dudu lake". He said the term "dudu" is used in many things and it does not means a penis at all which raises doubts to the prosecution's case and as result the offence was not proved.

The court perused the proceedings of the trial court. The typed proceedings shows PW1 testifying at page 6. She said that appellant inserted his penis into her anus. "*Aliniweka dudu lake sehemu ya haja kubwa, aliingiza mdudu matakoni sehemu ya haja kubwa. Kabla ya kuingiza mdudu alianza kunitemea mate sehemu ya haja kubwa".* The counsel for the respondent said in reply to these grounds of appeal that the victim (PW1) was the child of 12 years during the incident and due to her age it is not expected for her to say it directly that accused penetrated his penis into her anus. That, the use of word "dudu" was proper as both the court and the appellant did understood what the victim meant.

I agree with the respondent's counsel that due to PW1's age, the Africans traditions and customs it is not expected for her to say it direct that accused penetrated his penis into her anus. The trial Court did understood

what PW1 was saying and it recorded that PW1 said that appellant inserted his penis into her anus. In the case **of Joseph Leko vs. Republic,** (supra), the Court of Appeal mentioned several instances making the victim to fail to call direct the penis by its name and use other name. It held at page 14 of the judgment that, I quote:-

> *"Recent decisions of the Court show that what the court has to look at is the circumstances of each case including cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. The reason is obvious. There are instances, and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina. This is because of cultural restrictions mentioned and other related matters."*

From above cited case, there instances where a witness and even the Court would avoid using direct words showing penis penetrating anus. In our culture and upbringing, it is normal to use a mild or indirect word as a substitute to word considered to be too harsh when referring to something unpleasant or embarrassing. It is called euphemism. As it was stated by the Court of Appeal, even the court sometimes fails to name or mention the act of the penis to enter inside the anus. Taking the age of the PW1 (victim) who was aged 13 years at the time she testified and the fact

that she was testifying in the presence of the male trial Magistrate and appellant, it is not expected she will call direct the penis by its name. The same position was stated by the Court of Appeal in the cited case of **Haruna Mtasiwa vs. Republic**, (supra), that given the age of the victim it was not expected she would graphically tell the trial court that the appellant inserted his penis in her anus. The act of victim to refer to the penis as "dudu" was sufficient.

In the present case, the appellant did not cross examine the victim in this aspect which means that he did understood and was not challenging the victim's evidence. Even in his defense, the appellant alleged that the case was fabricated because of dispute over the ownership of land with PW2 who is victim's mother. It was clear that appellant understood what he was charged with and he understood the evidence of PW1. The evidence by itself proved that what PW1 was talking about is the offence of unnatural offence. That, the appellant did had carnal knowledge of her against the order of nature. PW1 said in her testimony that when he inserted his penis into her anus she felt pain and she started to cry. It is clear that PW1 was talking about the act of the appellant to sodomize her and this evidence was

understood to appellant. Thus, the 3rd, 4th and 5 grounds of appeal has no merits.

In the 6th ground of appeal the appellant claims that the defense evidence was not considered by the trial Court. The State Attorney admitted that the defense case was not considered by the trial Court, but she said that this Court has jurisdiction to wear the shoes of trial Court and evaluate the whole evidence and make its decision.

The law is settled that failure to consider the evidence of the defense is fatal to the trial or proceedings. This was held in the case of **James Bulow & Others vs. Republic [1981] T.L.R. 283.** In **Jonas Bulai vs. Republic**, Criminal Appeal No. 49 of 2006, Court of Appeal of Tanzania, at Dar Es Salaam, (unreported), it was held at page 10 of the judgment that:-

> *"It is an imperative duty of a trial judge to evaluate the entire evidence as a whole before reaching at a verdict of guilty or not guilty."*

This Court was of similar position in **Elias Stephen vs. Republic [1982] TLR 313,** where it observed that:

> *"It is clear from the judgment that the trial magistrate did not seriously consider the appellant's defense. Indeed, he did not even consider the*

other defense witnesses who testified to it. He merely stated defense of accused has not in any way shaken the evidence."

In the present case, the trial Court did not evaluate the defense evidence. The trial Magistrate stated in the judgment that the defense side failed to raise a reasonable doubt to the prosecution case as the appellant denied to commit the offence of unnatural offence. It is true that in his defense the appellant denied to commit the offence, but he went further to say that the case was fabricated because of dispute over the land ownership with victim's mother – PW2. The trial court failed to look at this defense. The trial Court was supposed to evaluate the said evidence and make decision therefrom.

This Court, being the first appellate Court, is duty bound to weigh and re-evaluate the entire evidence available in record and make its decision. This was stated by the Court of Appeal in the case of **Prince Charles Junior vs. Republic**, (supra), and in the case of **Zakaria Petro vs. Republic**, Criminal Appeal No. 124 of 2012, Court of Appeal of Tanzania at Mwanza, (unreported). In the case of **Seleman Mleka vs. Republic [1994] T.L.R. 210,** it was held that the High Court as the first appellate court would have legally determined the appeal by considering the evidence of the trial court

and come to its own conclusion upon consideration of the whole evidence properly admissible. Thus, this Court as the first appellate Court is duty bound to evaluate the whole evidence in record and come to its own conclusion.

As I stated earlier herein, the evidence from the PW1 (victim) proved that on 04.04.2020 around 07:00 hours the appellant did had carnal knowledge of her against the order of nature. Before committing the offence, the appellant did enter into the room where PW1 was sleeping with her young sisters, undressed her and he also took of his clothes, he put some clothes into her mouth, wet her anus with saliva and inserted his penis into her anus.

The testimony of PW1 is supported by that of PW2, PW3, PW4 and PW5. PW3 who is Village Executive Officer testified that he was informed by Baraka that there is incident of the child being sodomized and he sent militia to arrest the suspect. Suspect was arrested and he was brought to village office together with the victim. He asked the victim about the incident and she said that it was the appellant who sodomized her. PW3 asked the appellant about the incident and he admitted to commit the incident. PW2 evidence is that when she went back home from fetching water, she was

informed to go to village office. There at village office she was informed that her daughter – PW1 was sodomized by the appellant. PW4 is the police officer who recorded the cautioned statement of the appellant. He testified how the said cautioned statement was recorded. The cautioned statement was admitted as exhibit P1 after the appellant did not object to its tendering. In the said cautioned statement, the appellant admitted to have carnal knowledge of PW1 (victim) against the order of nature. The last prosecution witness was PW5 who is the doctor who examined PW1 on 04.04.2020. He testified that PW1 had bruises on her anus, her anus was torn, it was inflamed and she was feeling pain. PW5 was of the opinion that PW1 was sodomized. All of these evidence proved that it was the appellant who did had carnal knowledge of the PW1 against the order of nature.

In his defense, the appellant testified that on 03.04.2020 he was at the house of PW2 and militia arrested him. He said he did not commit the alleged offence as the said the case was fabricated by his sister following the presence of dispute over the ownership of the land between them. This appellant's defense does not raise any doubt to prosecution's case. The appellant's defense appears to be an afterthought as when appellant's sister – PW2 was testifying he did not cross examine her at all. Also, he did not

cross examine PW1 (victim) on important issue that he did have carnal knowledge of her against the order of nature. Failure to cross examine is similar to admission as it was held in the case of **Emmanuel Saguda @ Sulukuka and Another vs. Republic**, Criminal Appeal No. 422 "B" of 2013, Court of Appeal of Tanzania, at Tabora, (unreported). In the case of **Medson Manga vs. Republic**, Criminal Appeal No. 259 of 2019, Court of Appeal of Tanzania at Iringa, (unreported), it was held at page 12 of the judgment that;-

> *"Failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence and will be estopped from asking the trial court to disbelieve what the witness said.* "

As the appellant failed to cross examine PW1 (victim) on the important issue of having carnal knowledge of her against the order of nature, and his failure to cross examine PW2 at all implies his acceptance of the truth of the PW1 and PW2 evidence and he is estopped from asking the trial court to disbelieve what these witnesses said. The said defense case does not raise any doubt to the prosecution's case. This evaluation of the evidence available in record has determined the appellant's last ground of appeal that the prosecution failed to prove the offence without doubt.

Therefore, I find that all grounds of appeal are without merit and I proceed to dismiss the appeal in its entirety. It is so ordered accordingly. Right of Appeal explained.

A.E. MWIPOPO

JUDGE

06/04/2023