IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 90 OF 2022

(Originating from Criminal Case No. 13/2022 of Resident Magistrate Court of Shinyanga at Shinyanga)

DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

HAROLD GAMALIELI @ MKARO .....RESPONDENT

JUDGMENT

16th March & 28th April, 2023

A. MATUMA, J.

In the resident Magistrates court of Shinyanga at Shinyanga, the respondent stood charged for Attempt to commit unnatural offence contrary to section 155 of the penal code, Cap. 16 R.E. 2019.

He was alleged to have on 12th August 2022 at Makedonia KKT area within Shinyanga Municipality in Shinyanga Region attempted to have carnal knowledge of a boy whose name for the purpose of this judgment shall be referred to as B S/O T @ K or the victim against the order of nature. The boy was said to have only 8 years old.

The prosecution brought eight witnesses and tendered one exhibit (PF3) to prove the charges against the respondent.

The respondent was the only witness in his defence. After a full trial, the trial court found that the respondent was not guilty of the offence. It thus acquitted him. The Director of Public Prosecutions was aggrieved with such acquittal hence this appeal with a total of four grounds of appeal namely that;

1. *The trial magistrate erred in law and fact by giving contradictory findings in evaluating evidences thereby reached in erroneous decision.*
2. *The trial magistrate erred in law and fact when he failed to consider the evidence adduced by other prosecution witnesses in assessing the credibility of the victim.*
3. *The trial magistrate erred in law and fact by improper findings particularly when she added the word "anus" which was never pronounced in the evidence of the victim.*
4. *That, since the trial magistrate does not dispute the absence of penetration and since the accused could not shake the prosecution case it was wrong to rule that the charge against the accused was* not proved beyond the required standard.

At the hearing of this appeal the respondent was present in person and had the legal representations by Mr. Gasper Mwanalyela and Nicholaus Majebele learned advocates.

M/s Wapumbulya Shani, learned state attorney represented the appellant, The Director of Public Prosecutions.

The learned state attorney dropped ground no. 4 of the appeal supra and argued ground no. 1 and 3 together contending that the learned trial magistrate did not comply with section 312 (1) of the CPA, Cap 20 R.E 2022 when she introduced new matters in the judgment which were not in the proceedings or evidence and used such extraneous matters to reach her decision.

The learned state attorney submitted that the learned magistrate at page 13 of the impugned judgment recorded that the victim testified that the respondent inserted his penis into his "anus" while the victim in his evidence did not us the term "anus" nor any prosecution witness used such term in evidence.

She then argued that in accordance to the evidence of the prosecutions which is on record, all witnesses referred "buttocks" and not "anus" as

the part of the victim's body in which the respondent inserted his penis in an attempt to penetrate it into the anus.

The learned state attorney further argued that the trial magistrate confused the two terms which carries different meanings. She then cited to me the case of ***Geofrey Ntapanya and another versus DPP, Criminal Appeal no. 232 of 2019*** in which the court of appeal held that it is wrong to introduce extraneous matters in the judgment whose effect is to make the impugned judgment void and the remedy is to quash it and step into the shoes of the trial court to re-compose a new judgment.

In the second ground, the learned state attorney submitted that the trial magistrate did not consider the evidence as a whole. She then sailed this court to the evidence of prosecution witnesses which she considered to have proved the charges against the respondent beyond any reasonable doubts. She finally argued this court to allow this appeal by finding that the respondent is guilty of the offence charged, convict him and enter the sentence in accordance to the law.

For the respondent it was Mr. Nicholous Majebele learned advocate who took the floor to argue against this appeal contending that all what the trial magistrate did was justified.

In respect of ground no. 1 and 3 of the appeal, the learned advocate submitted that it isn't true that section 312 (1) of the CPA supra was violated or that the learned trial magistrate introduced extraneous matters in the impugned judgement.

The learned advocate argued that the victim being aged 8 years only was not expected to refer to every word in its terms. That the victim in his evidence testified that the appellant had inserted half of his "dudu" penis so to speak into his **"makalio"**.

With the term **"makalio"**, the learned advocate argued that the victim intended to say the word **"anus"** and therefore the trial magistrate was right to infer the word "anus" because by necessary implications a penis cannot enter half in the buttocks without entering into the anus. He further argued that since the victim used the term **"dudu"** which was openly known by both parties to mean a **"penis",** likewise **"makalio"** should be known to mean **"anus"**. The learned advocate distinguished Geofrey Ntapanya's case supra.

Mr. Nicholaus Majebele learned advocate then counter argued on ground no. 2 of the appeal by submitting that the trial magistrate considered all the evidence on record only that the prosecution evidence

did not prove the case against the respondent beyond any reasonable doubts. He finally prayed for dismissal of this appeal.

I will start with ground no. 1 and 3 as argued by the parties on whether the learned trial magistrate introduced extraneous matter in the judgment thereby prejudicing her findings to the determent of justice.

The complained extraneous matter is the use of the term **"anus"** in the impugned judgment. In fact there is no dispute by either party that the impugned judgment referred to the term "anus" as the party of the body stated by the victim to have been assaulted by the respondent by inserting half of his penis.

That is seen at page 13 of the trial court judgment when the trial magistrate was addressing the so called contradictions between prosecution witnesses. The learned trial magistrate was of the view that the victim contradicted other witnesses particularly PW2 who testified to have been told by the victim that the respondent had told him to bow down undress his short and try to sodomize him while the victim himself B S/O T @ K testified that the respondent inserted half of his penis into his anus after having applied oil on his buttocks.

The issue is whether the victim had ever testified that half of the respondent's penis was inserted into his "anus" and if "makalio" carries the same meaning to "anus" as contended by Mr. Majebele learned advocate. In the first instance throughout the evidence of the victim he did not say that the respondent inserted half of his penis into the anus but into the buttocks. That is not in dispute by either party in this appeal only that the respondent's counsel are inferring the term used by the victim "buttocks" to mean "anus".

It was the respondent himself who introduced the term "anus" in his defence at page 50 of the proceedings in the second paragraph contending that the victim contradicted the doctor when he said that half of the penis was inserted into his anus while the doctor did not see any sign of penetration into such victim's anus. In that respect, it appears that the trial magistrate took the defence of the respondent and analyzed it as the prosecution evidence which is in fact not true. The victim did not testify that the respondent inserted half of his penis into his anus but he testified that the said penis was half penetrated into his buttocks.

Let us look now whether the two terms carry the same meaning. According to TUKI English Swahili dictionary "Anus" means "Mkundu"

while "buttock" means "tako". Again according to the Oxford concise English – Swahili Dictionary "anus" means "tundu ya kutolea kinyesi kwa binadamu au mnyama" while buttock means "tako" or "Kitako".

In the circumstances the two terms are quite different in form and meaning. While anus is a hole pipe "tundu" buttocks are just two round flesh parts of human body that forms the bottom "makalio".

The witness referred to "makalio" which is buttocks and not "mkundu" which means "anus".

Even the trial magistrate to show that she was aware of the difference in the two terms used both terms on different contexts. Let us see how did the trial magistrate used the two terms at page 13 of the impugned judgment,

> *"XY testified that the accused undress him apply oil on his* ***buttocks*** *open his zip and* ***put "dudu" on the buttocks*** *and half of the penis entered inside the* ***"anus".***

From that quotation it is obvious the learned magistrate differentiated that two terms to the effect that the oil was applied to the buttocks but penetration of the penis was in the anus for half of it. With such analysis it means the learned trial magistrate was drawing an inference

of a complete offence of unnatural offence while in fact the offence charged was just attempt to commit unnatural offence in the meaning that there was no penetration even the slight one into the victim's anus. The evidence of the victim was just establishing penetration of the respondent's half penis into the buttocks and not into the anus.

Such insertion of the term "anus" by the trial magistrate resulted into a misleading defence of the respondent who was referring to the victim's evidence contrary to the real evidence of the victim himself. As a result the misleading defence prejudiced the mind of the trial magistrate by treating the contentions of the respondent as the evidence of the victim and therefore reaching to the conclusion which is against the evidence on record. See the same page 13 when the trial magistrate held that since the victim testified that half of the penis of the respondent penetrated into his anus, the medical examination would have revealed such penetration but the anus was found with nothing unusual. In that respect the trial magistrate concentrated to analyze and determine whether the offence of unnatural offence was proved which was not the charges against the respondent before her. She did not rest her mind on the allegations of **attempt to commit unnatural offence** which was the offence charged and determine whether she believed the victim's

evidence to the effect that half of the respondent's penis entered into his buttocks and whether such amounted to an attempt to commit the charged offence.

In that respect, I agree with the learned state attorney that the trial magistrate introduced into her finding extraneous matters which affected her findings and therefore such findings cannot stand for being prejudicial to justice which requires judicial officers in composing judgments to points out the points of determination, the decision thereon and the reason for the decision, section 312 (1) of the CPA supra as rightly cited by the learned state attorney.

In the instant matter the learned trial magistrate made the point for determination to be ***"whether half of the respondent's penis penetrated to the victim's anus*** which was out of context as elaborated herein above. The point for determination should have been ***whether half of such penis was penetrated into the buttocks of the victim and whether such act amounted to an attempt to commit unnatural offence under section 155 of the penal code*** supra. I therefore quash the judgment of the trial court for having been composed out of context and against the charge and evidence on record the act which prejudiced the parties' rights to have the matter

determined within context of the charge, evidence and the records beforehand. My findings supra are in accordance to the guiding principle in the case of ***Omari Khalfan v. The republic, criminal Appeal no. 107 of 2015*** whereas the court of appeal having found that both sides of the case were prejudiced by the omission of the trial court to give adequate appreciations on the evidence adduced and none compliance to the law quashed the findings of the trial court. The anomaly in that case was affecting the entire proceedings but in the instant matter the parties are not at issue on the proceedings of the trial court. In that respect such proceedings remains intact.

Now what is the way forward. The learned state attorney argued this court to step into the shoes of the trial court and re-compose a new judgment on the available proceedings.

The learned advocates for the Respondent did not say anything regarding such suggestion. Perhaps, because they believed that the trial magistrate did not commit any wrong in using the term "anus" instead of "buttock" in her analysis of evidence on record. Since they did not as well challenge the proceedings of the trial court, I find it that the suggestion by the learned state attorney to re-compose a new judgment legally sound. That is in accordance to the guiding procedural rule that

the first appellate court has jurisdiction to step into the shoes of the trial court and do what ought to have been done. For the purposes of this case to compose the judgment in accordance to the proceedings on record.

Having determined so, the second ground of appeal which relates to the evidence on record shall be dealt with when determining whether or not the prosecution case was proved beyond any reasonable doubts.

In accordance to the learned State Attorney when arguing the second ground of appeal submitted that the prosecution case was proved beyond any reasonable doubt. She referred me to the evidence of witnesses for the prosecution as shall be refered herein below in the due course.

On the other hand the learned advocates challenged such evidence arguing the same to have not sufficied to prove the charges against the Respondent beyond any reasonable doubts.

Now, the charge against the respondent is an attempt to commit unnatural offence. In the case of ***Amrani Hussein versus Republic Criminal Appeal no. 13 of 2019*** the Court of Appeal held that while in unnatural offence penetration has to be proved the offence of attempt

to commit unnatural offence requires no proof of penetration. It can therefore be proved even in the absence of the evidence of the doctor who examined the victim.

To appreciate whether or not the offence of attempt to commit unnatural offence is proved this court by Lugakingira, J. as he then was in the case of ***Mwanahamisi Abdallah and another versus Republic (1981) TLR 265*** elaborated that;

> *"In attempts there should be an act directed at the fulfillment of the offence".*

In Amrani Hussein's case supra the court of appeal subscribed to the elaborations made in the case of mwanahamisi Abdallah supra as far as what would be amounting to an attempt to commit unnatural offence. It held that **there must be explicit acts directed at facilitating the commission of the offence**.

In the instant case the victim B s/o T @ K who gave evidence as PW2 testified that on the material date he was at his school and they did exams. When it got 12:00 hours they were permitted to go home. The respondent however took him to his office telling him that he was going to show him class four exams. The respondent who is a pastor and

school director having entered him in the office closed the doors. He then switched on his computer and played **sarafina movie**. He went on that he watched the movie for few minutes when the respondent directed him to bow down on the table. He was thereafter undressed his clothes and applied "curd oil" in the meaning of "mafuta ya mgando" in his buttocks. Then the respondent opened his trouser and inserted the penis (dudu) into the buttocks which entered half way. Under the circumstances he decided to lie to the respondent that he has heard his father's motorcycle outside. That prompted the respondent to release him. He put on his clothes and the respondent told him that he should not tell anybody. He was given Tshs 2000/= but refused it. The respondent called another pupil by the name Joshua and directed him to go and buy juice for him (the victim). Joshua complied but when he brought the juice he once again refused it. It is when he went home and disclosed the saga to his father, PW1.

At page 27 of the proceedings the victim further made it clear that he knew that it was a "dudu" (penis) which was inserted into his buttocks because having lied to the respondent that his further has arrived so that he is released, he wake up and saw such penis. He further stated at page 24 of the proceedings that he knew that what was applied to his

buttocks by the respondent was oil because he heard (sensed) something smooth passed through.

His evidence was in material particulars corroborated by PW3 Doctor Erasto Aron Mwambogolo who testified that having examined the victim found no bruises or injuries to the anus but there were signs of jelly which was unusual.

During cross examination PW3 further made it clear that the jelly was in a solid form and it was seen on penial area. He insisted that it was not usual for the jelly to be found at the anus.

The victim was further corroborated by Joshua Patrick PW4 who is a boy of 11 years old. In his evidence he testified that on the material date and time he was cleaning the respondent's motorcycle nearby the respondent's office;

> *"where I was cleaning a motorcycle and at the pastor's office is not far away."* Page 36 of the proceedings.

Thereat he saw the respondent and the victim getting into the respondent's office. Five minutes later, the respondent came out and gave him Tshs 2000/= to buy juice for the victim;

"After five minutes I saw pastor got out with XY. The pastor called me and give me Tshs. 2000/= and asked me to ask XY what kind of juice is he drinking and XY told me to go and take any kind of juice".

PW4 further testified that he went and bought a juice but when he brought it to the victim, the victim refused and gave it back to him but he also refused such juice and went to continue with his task of cleaning the motorcycle.

PW4 further testified at page 34 of the proceedings that the pastor now the respondent used to watch him movies in his office and at times used to touch his genital parts telling him that genital parts are his police or friends. That the respondent had touched his genital parts for about five or six times.

I further find that the victim is further corroborated by PW8 WP 9156 Takelove. In her evidence this witness testified that she went to meet the respondent at the school and asked him about the reported violence against the child and the respondent's reply was that he undressed the victim and applied sanitizer just to teach the victim values in action so that he could know that no one is allowed to touch that place.

In the absence of any or tangible contravening evidence by the accused against the herein above prosecution evidence as summarized and analyzed supra such evidence is capable of being held sufficient to convict because it has established the explicit act by the respondent which was carried on towards the facilitation of committing the crime of unnatural offence. The acts are;

i. the victim was undressed and bend on the table.

ii. the jelly was applied into his buttocks.

iii. the penis of the respondent was inserted half way into the buttocks which means had the victim not lied to the respondent that his father has arrived the respondent would have further pushed his penis into full penetration to the anus of the victim B S/O T @ K.

So the lying of the victim to the respondent acted as an intervening event which stopped a full commission of the crime of unnatural offence. The issue is therefore whether the defence evidence raised anything material to suppress such prosecutions' evidence.

The respondent was the only witness in his defence. He testified that on the material date he did not attempt to sodomize the victim. He made an argument that the victim contradicted the doctor who did not

see any penetration while the victim had alleged that half of the penis penetrated his anus. He further testified that he is incapable of having sexual intercourse because he has undergone operation from the stomach area to the genital parts thereby making him incapable of having sex.

During cross examination the respondent denied even to have the victim in his office that day. When he was cross examined whether there are grudges between him and the victim he replied that he had no grudges not only with the victim but also he had no grudges with the victim's father, PW1.

From the defence of the respondent we don't therefore find any suggestions of ill will motive by any of the prosecution witnesses. He however explained that lack of grudges is not an assurance that whatever the witness says is true. The witness may have undisclosed bad blood because one's heart is known to himself.

I agree with the respondent that lack of grudges should not always be taken to be an assurance of the credibility of a witness in a criminal trial. That is because in life it is a fact that one may execute an act prejudicial to another not because he has any grudge with him but on several other social demands. That is why we have heard people killing others just to

meet witchcraft needs, people lying against others just to please others e.tc.

Even in the case of ***Festo Mawata vs Republic, criminal appeal no 299 of 2007*** it was observed that,

> *"A witness might appear to be perfectly honest but mistaken at the same time. On the other hand it is a fact of life again that even lying witnesses are often impressive and convincing witness."*

In the circumstances, we don't take lack of grudges for granted to value the evidence of the witness.

Even though, lack of grudges, ill will motive or bad blood by the prosecution witness against the accused has been a considerable factor for credibility of the witness when the other facts and evidence on record are sufficient in themselves to prove the offence beyond reasonable doubts. Therefore what is important is the strength of the evidence of the witnesses against the accused person.

The witness should not be credited merely because he has no grudges with the accused person nor should he be discredited merely because

he had previous grudges with the accused. Each case should be determined in accordance to its own facts.

In the instance case, Mr Nicholus Majebele challenged the facts that the doctor PW3 in examining the victim found jelly in the buttocks of the victim. He maintained that what the doctor seen was the sign of jelly to the anus and not jelly itself to the buttocks.

It is true that PW3 testified that he found the sign of jelly. But he was more elaborative that such sign of jelly was at the anus which is not a usual thing. He further distinguished jelly from oil stating that jelly is solid while oil is liquid. Therefore by having seen the signs of jelly he meant the signs of solid oil (jell).

The evidence of PW3 generally established that the jelly's sign were seen at the anus in the meaning that the victim suffered sexual abuse by penetrating jelly into her anus through his buttocks. Whoever applied the jelly to the anus it is obvious he penetrated through the buttocks of the victim to apply the jelly to the anus. That corroborates the victim's evidence who testified that he knew that the respondent was applying oil to the buttocks because he felt something smooth passing through his buttocks.

I therefore find without any doubts that the victim's anus was established to have been smoothed by jelly which by necessary implication was done through the inner parts of the buttocks and not the outer part of the buttocks. That is in accordance to the victims own evidence; *"I heard smooth things passed through"* and the corroboration made by the doctor who saw signs of jelly at the anus.

Even in his evidence in chief, the victim was able to identify that the oil applied to him was curd meaning "mgando" which resembles to the findings of the doctor that it was a jelly which was applied at the anus of the victim.

I therefore dismiss the arguments of Mr. Majebele that jelly was not found as stated. Jelly when applied to the body it is not expected to be found in its visibility form. Once applied it is absorbed leaving out only signs which can be identified as happened in this case by the evidence of the doctor.

Therefore, the sign of jelly established by PW3 was enough to prove that the victim was in fact plastered with a jelly to his inner parts of the buttocks at the anus area.

The learned advocate also denied the facts that the Respondent confessed to PW8 to have attempted to commit the offence and that is why there was no tendering of cautioned statement.

I find the learned advocate to have misconceived the evidence of PW8. PW8 did not say that the respondent confessed to have committed the offence charged. What was there was just an admission to the facts of undressing the victim and applying what he referred to as sanitizer so that to teach the victim that he should not allow people to touch that area. PW8 in facts testified;

> *"I identified the pastor Harold Mkario, I interrogated him he has subjected the victim with violence while we are dealing with violence against children. He told me he was teaching him values in action. He told him to undress his short and applied sanitizer so that xy could know that no one is allowed to touch that place"*

Under the circumstances it was just an admission of certain facts and not a confession to the commission of the crime itself.

Taking what the Respondent told PW8 as an admission and not a confession to the crime itself, I find that such admission corroborated the evidence of the victim towards the crime itself.

The evidence of the defence did not thus destroy that of the victim on what had befallen him.

I find the victim B s/o T@K to have been a credible and reliable witness to what he told the court. He was coherent and consistent to the story throughout when he talked to his father PW1, to the doctor PW3, and to the woman police PW8.

He was further corroborated by PW4 his fellow pupil who saw the respondent entering with him into his office and in five minutes later came out and instructed him to buy a juice for the victim. The response to PW4 by the victim was too negative which suggested that at that time he was disturbed and not in a good mood. This is because the respondent told PW4 to ask the victim what kind of juice would he drink, the victim replied that any kind of the juice. When the juice was brought he refused it.

Those are positive suggesting facts that the victims was not in good mood and the reasons behind was made clear by his evidence that the respondent had sexually harassed him. I have no reasons to disbelieve the victim. Even PW4 stated in evidence that he was also at several times sexually assaulted by the respondent by touching his genital parts purporting to calm him that genital parts are friendly to him. That

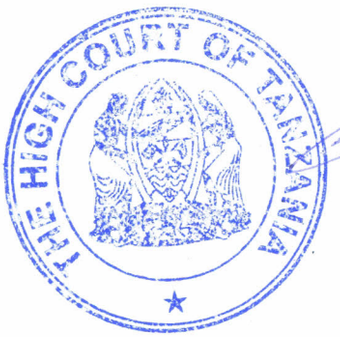
signifies that the respondent has the habit of making sexual violence to children who have been entrusted to him as a pastor and director of the school.

I therefore agree with M/S Wapumbulya shani learned State Attorney that indeed the prosecution case was proved beyond any reasonable doubts against the respondent.

Lack of penetration in this case exercised the minds of the respondent in his defence as he concentrated arguing that there was no evidence proving penetration and thus he was not guilty. As I have said earlier penetration for the offence of attempted unnatural offence is immaterial nor there is any need of the medical evidence to establish it.

The Offence of attempt to commit Unnatural offence can sufficiently be proved by explicit acts of the accused facilitating to the commission of the offence. In this case I have already said there are enough unbecoming acts by the respondent which constituted the offence of attempt to commit unnatural offence. I have already named those acts supra to include undressing the victim, bending him on the table, applying jelly to the victim's anus, himself to zip off his trouser and taking out his penis, and his act of inserting his penis a half way into the buttocks of the victim.

I therefore find the respondent Harold Gamalieli @ Mkaro guilty of the offence of attempted to commit unnatural offence contrary to section 155 of the penal code, cap 16 R.E 2019 as he stood charged. I accordingly convict him of the offence under such provision. It is so ordered.



A. MATUMA
JUDGE
28/04/2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 90 OF 2022

(Originating from Criminal Case No. 13/2022 of Resident Magistrate Court of Shinyanga at Shinyanga)

DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

HAROLD GAMALIELI @ MKARO .....RESPONDENT

SENTENCE.

Having convicted the respondent herein above Harold S/O Gamalieli @ Mkaro for the offence of attempt to commit unnatural offence, the parties contested for and against the sentence. The learned State Attorney M/s Wapumbulya Shani argued that the respondent be sentenced in accordance to the law despite the fact that they do not have any previous criminal records. She also prayed for compensation against Respondent to the victim. The learned advocate for the Respondent mitigated that the respondent is a first offender, he is a pastor who has a huge mass to guide. He has also a family depending on him. He thus prayed for lenient sentence to the Respondent (convict).

Section 155 of the penal code, Cap. 16 R.E 2019 under which the respondent was charged provides for a minimum sentence of twenty years imprisonment term against a person convicted of an attempt to

commit unnatural offence. That means depending on the circumstance of the case a life sentence might as well be justifiable and legal.

I however give weight to the mitigating factors by the respondent as stated by his advocate supra and sentence him to the minimum term of twenty years imprisonment.

I therefore sentence the convict (respondent) Harold Gamalieli @ Mkaro to suffer a custodial term of twenty years from the date of this order.

Right of appeal against the conviction and sentence is hereby explained.

It is so ordered.

A. MATUMA
JUDGE
28/04/2023