IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO.69 OF 2023

(Originating from the District of Sumbawanga at Sumbawanga in Criminal Case No. 47 of 2022 before Hon. G. J. William-SRM)

HAMZA ABDALLA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

06/12/2023 & 28/02/2024

MWENEMPAZI, J.

The appellant herein was arraigned before the Sumbawanga District Court (Trial Court) being charged with the commission of unnatural offence contrary to Section 154 (1)(a) and (2) of the Penal Code (The Law) (Cap. 16 R. E. 2019).

It was alleged that, on the 16th day of June, 2022 at Utengule area within Sumbawanga Municipality in Rukwa Region, the appellant did have carnal

knowledge against the order of nature with one A.K (name concealed) a child of eight (08) years old.

After his arrest on the 17th day of June, 2022, the appellant was then marched to the trial court on the 11th day of July, 2022, where the charge was read before him and, he pleaded not guilty. However, at the end of a full trial, he was found guilty and, he was convicted of the offence he was charged with, and thus sentenced to serve life imprisonment.

Aggrieved by the said decision, the appellant filed this appeal to this court in which his petition consisted of six (6) grounds of appeal which I find best to reproduce as hereunder;

1. *That, the prosecution side failed to prove the charge against the appellant as required by the law.*
2. *That, the trial court erred in both conviction and sentence for the appellant while mis observed that failure to produce the birth certificate to prove the age of the victim.*
3. *That, the trial court totally erred in law, point and fact by convicting and sentencing the appellant while the prosecution side failed to call any ten cell leaders in order to*

certify to the court the matter was reported to the authorities in which the contrary brings doubt to the eye of the law.

4. *That, the trial Magistrate misdirected himself in convicting and sentencing the appellant while he failed to note out that voire dire examination to the victim was not conducted since the victim was of a tender age, this shows that there was contravening of Section 127 (2) of the Evidence Act.*
5. *That, the trial court erred in law, point and fact in convicting and sentencing the appellant relying on the Exhibit P1 (Caution Statement) which was admitted illegally and the appellant was not given a chance to object it.*
6. *That, the trial court magistrate relied on the ingredients of the prosecution evidence which failed to make deep examination and evaluation of the substance, nature and quality of the adduced evidenced as a result he drew and arbitrary conclusion.*

In which, out of the above outlined grounds of appeal, the appellant prays for this court to allow his appeal and both conviction and sentence meted against him be quashed and that he be set at liberty.

On the 06th day of December, 2023 when this appeal was scheduled for hearing, the appellant had legal representation and therefore he appeared for himself, while, the respondent, Republic enjoyed the legal services of Ms. Neema Nyagawa and Mr. Ladislaus Micheal, both learned State Attorneys.

The appellant was invited first to submit for the grounds of appeal and in doing so, he only submitted that he prays for this court to allow this appeal by considering his grounds of appeal and set him free.

Submitting against the grounds of appeal, Ms. Nyagawa stated that she prays to argue ground 1 and 6 together and the rest will be argued at the trot as raised.

She started off that it is true the prosecution is duty bound to prove the charges facing the accused. That, in the present case, the prosecution was duty bound to prove:

1. *Whether the appellant had sexual intercourse with the victim against the order of nature.*

2. *If there was penetration.*

Ms. Nyagawa then submitted that, in proving the first element, the prosecution called the victim, PW1 at page 14. That, the victim testified that he knows the appellant who is their neighbor and he entered his penis into his anal orifice (Ref. page 14). She insisted that the victim testified the appellant and the victim had five episodes of the shameful deed and that he did not tell his mother due to threats from the appellant, but he was able to tell a neighbor known as mama Emmy, that this evidence is supported by the testimony of PW3 (page 19 paragraph 2) where the witness (Mama Emmy) testified that she was informed by the victim that the accused was doing bad things on his buttocks.

Submitting further particularly on the second ingredient as she raised, Ms. Nyagawa submitted that the victim testified that the accused was having sex with him on his buttocks. That, the evidence is confirmed and corroborated by PW5 (page 25) where the doctor who examined the victim testified that the victim had bruises in his anus, in which it implies that a blunt object was inserted. That, PW5's evidence shows that the offence of penetration against the order of nature was proved.

Ms. Nyagawa added that, in such offences of sexual in nature, the testimony of the victim is the best because in most cases the offences are

committed in privacy, especially where the court believes the evidence tendered, by the victim. She then referred this court to the case of **Yust Lata vs Republic,** Criminal Appeal No. 337 of 2015, Court of Appeal of Tanzania at Arusha at page 9 – 10 where it was held that: -

> *"It is trite law as stated in the case of Mkumba Versus Republic (supra) that in sexual offences, the evidence of a victim alone if believed, is sufficient to found conviction".*

Ms. Nyagawa then winded up that, as the ingredients she raised were well proved by the prosecution evidence, that it was proper for the trial court to decide the way it did.

The learned State Attorney then submitted on the second ground which concerned the proof of the age of the victim. She submitted that, the appellant was charged under section 154(1) (a) and (2) of the Penal Code, [Cap 16 R.E 2019]. That, age in that circumstance by itself justifies the sentence. Thus, the prosecution was duty bond to prove age, however, it was true that the birth certificate was not tendered.

Nevertheless, she submitted that, age of the victim can be proved by the victim, parent, guardian doctor or birth certificate. And in the records, the victim at page 14 testified that he is 10 years old. In addition to that,

PW2's (the mother of the victim) at page 15 did testify on the age of the victim. She stressed further that, since the law provides that age can be proved by those mentioned, then the age of the victim in the case at hand was indeed proved by himself and his mother. Ms. Nyagawa then referred to the case of **Isaya Renatus vs Republic,** Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, page 8 – 9, where the Court held that: -

> *"...It is desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or where available by the production of a birth certificate."*

She then insisted that as for this ground of appeal it should be dismissed as it has no merits as age of the victim was proved.

Submitting against the third ground of appeal which concerned the failure to call a ten-cell leader in which according to the appellant brings in doubt. In this, Ms. Nyagawa submitted that in this case only two ingredients were supposed to be proved, which are whether there was sexual intercourse against the order of nature and whether there was penetration. That, the ten-cell leader was not necessary to prove the offence charged as he was not a material witness. She then cited the case of **Abdalla Kondo vs**

Republic, Criminal Appeal No. 322 of 2015 Court of Appeal of Tanzania at Dar es Salaam where it was held that: -

> *"...it is the prosecution which have the right to choose which witnesses to call so as to give evidence in support of the charge. Such witnesses must be those who are able to establish the responsibility of the appellant in the commission of the offence. They must be material witnesses."*

Again, Ms. Nyagawa submitted against the 4th ground which stated that a voire dire test was not conducted and thus section 127(2) of Evidence Act, [Cap 6 R.E 2019] was contravened. She submitted that, the section provides that a child of tender age needs to promise to say the truth and that there is no need of conducting a voire dire test.

She insisted that, in this case at hand, the victim promised to speak the truth, and so section 127(2) of Evidence Act, was complied with. That, a Voire dire test is no longer a legal requirement. And therefore, she prayed for this ground to be dismissed.

Submitting on the last ground of appeal in which the appellant faults the trial court to rely on exhibit P1 and that he was not given a chance to

object and that the exhibit was admitted illegally. Ms. Nyagawa stated that, in dealing with this ground there are two points to be dealt with: -

i. That, if the exhibit was admitted illegally.

She clarified that, the proceedings show the witness did not identify the exhibit by signature and handwriting. That, the proceedings are silent that the exhibit was cleared for admission and she do agree that it was illegally admitted.

ii. That, the appellant was not given chance to object.

The learned State Attorney stated that it was the duty for the prosecution to link the exhibit with the appellant by trial within trial in which it was not conducted. That, the remedy therefore is to expunge the said exhibit from the record. In which, this court proceeds to do so, exhibit P1 is hereby expunged.

In conclusion, Ms. Nyagawa insists that the remaining evidence after the expunction of Exhibit P1 still proves the offence and that the prosecution executed its duty properly as the evidence on record proves that the appellant committed the offence.

In rejoinder, the appellant only submitted the same as what he submitted in chief and insisted that this court should not hesitate to release him.

After reading the grounds of appeal and the submissions made by the learned State Attorney, and also reading the records of the trial court before me, I am fortified that the only issue to be delt with in this appeal is ***whether the charge against the appellant was proved beyond the required standards of the law.***

I am aware of the rule that usually the trial court is best placed to determine the credibility of witnesses (See **Augustino Kaganya Ethanas Nyamoga & William Mwanyenje vs Republic** (1994) TLR 16 (CA). This is especially so, where the decision of the case is wholly based on the credibility of witnesses such as the present one (See **Ali Abdallah Rajabu vs Saada Abdallah Rajabu & Others** (1994) TLR 132. But it is also settled law that the duty of the first appellate court such as this, is to reconsider and evaluate the evidence and come to its own conclusions bearing in mind that it never saw the witnesses as they testified (See **Pandya vs Republic** (1957) EA 336. I will try to re-evaluate the evidence of the witnesses in the next few lines.

And in so doing, I will condense the six grounds of appeal into one ground that, the appellant's conviction was based on a case which was not proved to the required standard of the law.

Starting off, it is well understood that in sexual offences what is needed to be proved is, whether there was penetration and whether it was indeed the appellant who did the offence to the victim, and lastly is the age pf the victim in which it would determine the sentence to the offender.

As it is found under Section 130(4) of the Law as amended by the Sexual Offences Special Provisions Act 1998 in which it was the holding in the case of See **Omari Kijuu vs Republic,** CAT, Criminal Appeal No. 178 of 2004, where the Court of Appeal held that: -

> *"Penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence"*

In the circumstances pertaining in this case, the offence was allegedly committed behind closed doors and there were no eyewitnesses. So, the evidence of rape was that led by the victim himself, PW1 only. And as the Court of Appeal has repeatedly stated, the best evidence of rape must come from the victim, as it was decided in the famous case of **Seleman**

Makumba vs Republic, Criminal Appeal No. 94 of 1999 (unreported), the Court held: -

> *"True evidence of rape has to come from the victim if an adult,* ***that there was penetration*** *and no consent, and in case of any other women where consent is irrelevant that there was no penetration."*

At page 14 of the record of appeal, it is shown that PW1's testimony that the appellant had carnal knowledge with him against the order of nature, it was as follows: -

> *"I know Hamza Abdalla since he stays near with us. Hamza did rape me in my buttocks, he threatened me if I reveal the secret, he will kill me with the knife. He did undress me. I did experience strong pains. He did just do five times; I did not tell my mother since he threatened me for if I reveal the secret. He did that when I arrive from school. I did tell my neighbour called Mama Emmy and she told me she will inform my mother....."*

In terms of section 130 (4) *(supra)* and on the authority of **Selemani Makumba** (supra), I am convinced that PW1's testimony above is proof of rape as there is evidence that there was penetration of the assailant's

penis into the victim's anus. Therefore, it is well established that PW1's evidence proved the offence the appellant was charged with to the required standard.

Nevertheless, PW5's who was medical practitioner who examined the victim, did testify that as he examined the victim's anus, he had bruises and pain and that the presence of bruises implied that there was a blunt object that was inserted inside his anus. Therefore, to this juncture it is proved that the victim had undergone the shameful offence, but who did it?

It is in the records of appeal that the victim was able to identify the offender because it is believed (as he testified) that the act was done in the afternoon when the victim comes back from school and also, the assailant was well known to the victim before the offence as he is their neighbour. The above extract of PW1's testimony does support my argument.

The supportive testimony as of identification was from PW2 (victim's mother) and PW3 (the neighbour). At different times during testifying, they both told the trial court that they knew the appellant well before the

offence. Therefore, the issue of identification has no any doubt as the offender was well known to them.

In the case of **Waziri Amani vs Republic** (1980) TLR 250 regarding evidence of visual identification, the Court held that: -

> *".....in a case involving evidence of visual identification, no Court should act on such evidence unless* ***all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely watertight ..."***
>
> **[Emphasis added]**

It is in strong holding that the appellant herein was well identified by the victim for he was well known before the offence and also, he was sodomized when he comes back from school in which it is well known that Tanzania schools' studies do end in a broad day light.

As for the age of the victim, this was well proved by the victim himself as seen at page 14 of the typed trial court's proceedings where he stated that he is 10 years old, and his mother as seen at page 15 where she stated that the victim is 10 years old.

In the celebrated decision of the Court of Appeal, in the case of **Haruna Mtasiwa vs Republic,** Criminal Appeal No. 206 of 2018, CAT at Arusha, it was held that, the age of the victim can be proved by the birth certificate and in its absence, when the mother has testified on the age of the victim, a birth certificate is not required to prove the age of the victim. Considering the evidence on record, I am convinced to rule out that the victim was 10 years old when he encountered the sodomy from the appellant.

With those findings, I am of the considered view that the charge levelled against the appellant was proved to the required standard in criminal cases. I thus find no merit in this appeal and proceed to dismiss it entirely. Conviction by the trial court is hereby upheld and the appellant is sentenced to life imprisonment.

It is so ordered.

Dated at Sumbawanga this 28th day of February, 2024.

T. M. MWENEMPAZI

JUDGE

Judgment delivered this 28th day of February, 2024 in Judge's chamber in the presence of the appellant and Ms. Godliver Shiyo, State Attorney for the Respondent.

T. M. MWENEMPAZI

JUDGE

28/02/2024