IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 77 OF 2023

(Originating from Resident Magistrates' Court of Katavi at Mpanda in Criminal Case No. 05 of 2023)

WAHABU OMARY @ SAID.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

04/12/2023 & 23/01/2024

MWENEMPAZI, J.

The appellant herein was arraigned before the Resident Magistrates' Court of Katavi at Mpanda (Trial Court) for the offence of unnatural offence contrary to Section 154 (1) (a) and (2) of the Penal Code [Cap.16 R.E. 2022].

It was the prosecution side's case that, on the 01st day of March, 2022 to 30th March, 2023 at Kawajense within Mpanda District in Katavi Region, the appellant did have sexual intercourse with a boy named **F.S** (name concealed) aged 15 years old, against the order of nature.

On the 25th day of April, 2023, the appellant was marched to the trial court 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 a term of thirty (30) years imprisonment and to compensate the victim Tshs. two Million only. (2,000,000/=).

Aggrieved by that decision, the appellant filed this appeal to this court which consists of five grounds, in which I find best to reproduce as hereunder;

i. *That, the trial court erred at law and fact to convict the appellant relying upon a contradictory and doubtful medical doctor's report which showed that the act against the order of nature was committed three months back contrary to the victim's testimony who testified that the act was committed in January 2022, i.e more than 14 (fourteen) months back.*

ii. *That, the trial court erred at law and fact to convict the appellant without summoning and hearing one Philipo, a friend of the victim who is said to have accompanied the victim on all occasions.*

iii. That, the trial court erred at law and fact to believe and work upon it the victim's doubtful and contradictory evidence who stated that he has been communicating frequently with the Appellant by mobile phone without presenting the mobile phone to be admitted as Exhibit.

iv. That, the trial court erred at law to ignore a clear and genuine Evidence of Sahila Selemani (DW2) with regard to a place were the victim provided that he was meeting the appellant and commit the act of rape. That, the victim provided to be at Uswazi Street contrary to DW2's evidence who provided that their residence is at Nsemulwa area and not Uswazi street.

v. That, the trial court erred at law to convict the appellant with an offence which the prosecution failed to prove beyond reasonable doubt.

When this appeal was scheduled for hearing, the appellant had no legal representation while the respondent, Republic enjoyed the legal services of Mr. Ladislaus Micheal and Ms. Neema Nyagawa, both learned State Attorneys.

As the appellant was invited to submit for his grounds of appeal, he only prayed for this Court to consider his grounds of appeal and allow this appeal.

Responding to appellant's submission, Mr. Ladislaus submitted that his side does not support this appeal. That, his side finds the decision of the trial court to be proper.

He started off by submitting for the first ground that, the appellant is faulting the medical report that it differs with the testimony of the victim regarding the actual period of the commission of the offence. The learned State Attorney insisted that this ground has no merit and that, the appellant is charged with the offence committed on diverse dates. That, the victim's evidence as found on page 5 of the typed proceedings, he testified that he knew the appellant on January, 2022 and that, there after he met the appellant in different occasions as he was sodomized by him in every occasion they met.

The learned State Attorney added further that, at page 21 paragraph 2 of the typed proceedings of the trial court, the doctor who examined the victim confirmed that the victim has been penetrated on his anus many times and in that, Mr. Ladislaus denies the appellant's claim that there was contradiction between the victim's testimony and the doctor's report.

In insisting his point, Mr. Ladislaus referred me to the case of **Donald Mwanawima vs Director of Public Prosecution**, Criminal Appeal No. 352 of 2019, CAT at Sumbawanga where the court dismissed the argument based on contradiction of dates because the dates mentioned were not contradiction as they were the dates the offence was committed, and so he prayed for this ground to be dismissed.

Submitting against the second ground of appeal, Mr. Ladislaus submitted that in law there is no specific number of witnesses required in order to prove an offence. He referred his argument to Section 143 of the Law of Evidence Act [Cap 6 R. E. 2022]. That, the witnesses who were summoned were sufficient to prove the offence against the appellant, and that in sexual offences, the best evidence is that of the victim as it was held in the **Donald Mwanawima's** case cited above as seen at page 11 of its decision.

Coming to the third ground of appeal, the learned State Attorney submitted that in the present charge, the ingredients to be proved were penetration to the victim's anus and he referred me to the case of **Emmanuel Elia Mringi Saimon Mreta vs Republic**, Criminal Appeal No. 292 of 2015, Tanzlii.

In addition to that, Mr. Ladislaus submitted that when the victim was testifying, there was no any question that concerned phone communication as the appellant himself admitted the facts to this case. Nevertheless, the appellant did not deny that he was communicating with the victim as seen at page 29 of the typed proceedings. Again, Mr. Ladislaus referred me to the **Donald Mwanawima's** case *(supra)* at page 19 paragraph 1, and in so doing he prayed for this court to dismiss this ground for it too has no merit.

In the fourth ground of appeal, Mr. Ladislaus submitted that according to the victim's testimony during cross examination, he told the trial court that he does not know the residence of the appellant as at page 7 of the typed proceedings at the last paragraph. He added that, DW2 also testified that the appellant is employed and, in most cases, they are not together and that DW2 is the appellant's wife. The learned State Attorney winded up ground four by submitting that, the victim is aged 15 years old and it is impossible to know various places, therefore he prayed for this ground to be dismissed too.

Mr. Ladislaus arguments against the fifth ground of appeal was that, the offence charged against the appellant requires proof of whether there was penetration. He proceeded that the victim's testimony was that the appellant had sodomized him and at page 6 of the typed proceedings he

told the trial court that on Friday, March 2023 he met the appellant at Mpanda hotel where the appellant took him into his house and had carnal knowledge of him against the order of nature.

Learned State Attorney added further that the testimony PW2 was that she noticed the change in behaviour of the victim and upon inquiry, the victim mentioned the appellant as the person who had sodomized him several times, and that he could not report in time because he was threatened.

In addition to that, Mr. Ladislaus proceeded that PW4's testimony was that the victim's anus has been penetrated by blunt object several times as the rectum was not intact as seen on page 21 of the typed proceedings, and therefore it is the view of the prosecution side as represented by Mr. Ladislaus that the offence against the appellant was proved beyond any reasonable doubt. And therefore, he prays for this ground to be dismissed too.

In his rejoinder, the appellant reiterated what he had submitted in chief, and that left this court with ample time to determine this matter to its finality.

Reading the trial court's judgment, it appears that, to a large extent the appellant's conviction was based on the testimony of the victim (PW1),

Medical Expert (PW4) and the PF3 which was tendered as Exhibit and marked as **PE2.** An important question that arises is **whether the testimony of PW1 sufficiently proved the appellant's guilt before the trial court.** Whereas, when one reads the grounds of appeal, it would be noticed that the second, third and fifth grounds of appeal together suffice to deicide this appeal amicably, and I will proceed to determine them together.

Nevertheless, 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). But it is also settled law that the duty of the first appellate court such as this, is to reconsider and re-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.

Again, it is true that the best evidence is that of the victim as it was submitted by the learned State Attorney and he referred me to of **Donald Mwanawima's case** *(supra)* in insisting on his submission.

In the trial court's record, PW1 the victim testified that, on January 2022 is when he knew the appellant through his friend known as Philipo. That, it was this friend (Philipo) who convinced him to go to the appellant as

the latter wanted to have sex with another man. That, PW1 and Philipo together went to the appellant's house and it was around 20:00 hours, nobody has seen them. While they were inside, the appellant took a box which had condoms and undressed himself and required PW1 to lie on a mattress and he inserted his penis in PW1's anus and he felt pain. As he had finished, the appellant threatened them not to utter a word to anyone or he will kill them, and therefore he vacated the place while Philipo remained behind.

PW1 proceeded that the next day he went to Philipo's house and he was connected the appellant through a mobile phone and the appellant required PW1 to go to his place and PW1 did go. As he reached their, the appellant undressed himself and he was undressed and the appellant again inserted his penis in PW1's anus and after he had completed, PW1 put on his clothes and the appellant gave Tshs. 7,000/=. Thereafter, PW1 stated that he has been communicating with the appellant through the use of mobile phone.

PW1 added that, on March 2022 the appellant communicated to him through a mobile phone, he met him at Mpanda Hotel and took him to a house as they entered, he was told by the appellant to bend down and again the appellant did put condom on his penis and inserted it in PW1's anus and after completion the appellant gave PW1 Tshs. 5,000/=.

When crossed examined, PW1 stated that he started to have sex against the order of nature in January 2022 and he was solicitated by his friend known as Philipo, as he started the unnatural offence with this Philipo in the first place. PW1 added that, in the house where he was sodomized by the appellant, they were three people, that is, himself, Philipo and the appellant. Lastly, he stated that until the day he his cross examined he had sex against the order of nature with five different men. See pages 5, 6, 7 and 8 of the trial court's typed proceedings.

I am aware of the well-established legal position that every witness is entitled to credence unless proved otherwise, as it was stated in the case of **Goodluck Kyando vs Republic** [2006] TLR 363 at page 367 where the Court categorically stated that:-

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

At this juncture, the credence of PW1 it is indeed in no doubt at all that he has been sexually penetrated against the order of nature, and this fact does not require the opinion of a medical expert as the victim himself has admitted that he has been doing the unnatural offence firstly with his friend Philipo before knowing the appellant and until the day he was

testifying, he had had unnatural sexual intercourse with five different men.

It is also in record that, PW1 stopped attending school as he was teased by his fellow pupils that he is gay 'shoga' and that led in exposing the appellant as the offender who had sodomized him severally, after being influenced by his friend known as Philipo, who had also participated in committing the shameful deed before meeting the appellant as he testified during cross examination at the trial. See page 7 of the typed proceedings of the trial court.

As I conceded earlier that in sexual offences the best evidence comes from the victim, but I am underlining that the words of the victim of sexual offence should not be taken as a gospel truth, but her or his testimony should pass the test of truthfulness. This was the holding in the case of **Mohamed Said vs Republic,** Criminal Appeal No. 145 of 2017 CAT – Iringa. (Unreported).

After going through the testimony of the victim, and that of the medical expert (PW4), and the exhibit tendered in evidence and marked as Exhibit PE2, I do believe that the victim was surely sodomized, not once but time and time again. He did testify that he has been sexually penetrated against the order of nature not once and not by one person but rather

five different men, and he even went further to testify that he was already participating in the shameful act with his friend known as Philipo even before he met the appellant.

Again, it is in the records that, PW1 testified that it was Philipo his friend who introduced him to the appellant. It is also in the records that, this Philipo told PW1 that the appellant wants to have sex with another man. Allegedly, it is Phillipo who had convinced PW1 to go to the appellant's house and as they reached at his house, the appellant had carnal knowledge of PW1 against the order of nature while Philipo was present. The only person who would have proved that truly as testified by PW1 that the appellant was the one who had carnal knowledge of the victim is Philipo. This is because, all the witnesses who were summoned to testify were told by the victim himself that the appellant had sodomized him, but according to the records, Philipo was the one who introduced the victim to the appellant and according to the records before me, he was twice present when the two were involved in the shameful act. It is however unfortunate that the records before me do not reveal that Philipo did confirm anywhere or to anyone that it is indeed the appellant who had sodomized the victim time after time.

Moreover, the records before me reveal that there was mobile phone communication between the victim and the appellant as testified by the

victim that in March 2022, the appellant called him through the cellular phone and the two met at the Mpanda Hotel where the appellant took the victim to a house and asked him to bend down, and he wore a condom on his penis and started to insert it into the victim's anus.

It is an open truth that at this point the victim's dignity and reputation has been ruined, and in attempts to restore part of what has remained, I expected that the prosecution side would have summoned Philipo to corroborate the testimony of PW1, or rather tender in evidence the mobile records of communication between the victim and the appellant as alleged, so that it would have been proved that it was indeed the appellant who sodomized the victim time and time again in fear of convicting a wrong person.

In absence of the witness who would have corroborated the testimony of the victim whereas there was a person who has been mentioned by the victim to be present during the commission of the offence, my hands I tied by the chains of the law for me to draw an adverse inference against the prosecution for failure to summon the witness who is in reach without the prosecution side showing any sufficient reason as to why they ommitted the particular witness, whereas in this case Philipo was to be summoned to testify the identification of the appellant as the offender of the offence against the victim.

In similar vein, I am again entitled to make an adverse inference from the failure to produce communication record between the appellant and the victim that raises the question whether or not it was actually the appellant who had sexual intercourse with the victim against the order of nature.

The Court of Appeal of Tanzania was of the same stand as it held in the case of **Aziz Abdalla vs Republic,** [1991] TLR 71 where it stated that:-

> *"Adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution."*

Again, in the case of **Emmanuel Senyagwa vs Republic,** Criminal Appeal No. 22 of 2004 (CAT) at Dar-es-Salaam (Unreported), it was held that:-

> *"We think we are entitled to make an adverse inference from the failure to produce PF3 even after it was said that it was going to be tendered. That raises the question whether or not there was really sexual intercourse. If no, then there was no rape."*

In that regard, with the records of appeal before, I am fortified that the testimony of PW1 was not sufficient to prove the appellant's guilt before the trial court, and I do concur with the appellant that his conviction was

based on the case which was not proved beyond the required standards of the law. Therefore, I do allow the three grounds of appeal, meaning the second, third and fifth ground for they sensibly proved to have merits.

Consequently, I proceed to quash the appellant's conviction. The sentence earlier imposed upon him and the compensation order of Tshs. 2,000,000/= are hereby set aside. I then order the appellant's immediate release from custody unless he is held therein for other lawful cause.

It is so ordered.

Dated at Sumbawanga this 23rd day of January, 2024.

T. M. MWENEMPAZI

JUDGE