IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 124 OF 2019

(Appeal from the Judgment of the District Court of Ukerewe at Nansio (Selemani, RM) dated 18th day of June, 2019, in Criminal Case No. 11 of 2019)

EMMANUEL S/O JOSEPH..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

1st December, & 18th January, 2021

ISMAIL, J.

The appellant was arraigned in the District Court of Ukerewe at Nansio, facing a charge of indulging in an unnatural sex, contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2019. The allegation, as gathered from the charge sheet is that, in the night of 18th January, 2019, at Nabweka village within Ukerewe District in Mwanza region, the appellant carnally knew DEF (victim), a boy of seven years of age, against the order of nature.

Facts of the case are pretty straight forward. They are to the effect that the appellant who is popularly known as Emma is the neighbour of the victim and a close friend the latter's family. On the fateful day, the appellant went to the victim's house and requested to leave with him so he can buy him a soda. Noting that the appellant had done so before, the victim's mother (PW4) acceded to the request and the duo left. After a long wait, PW4 made a follow up. Along the way, PW4 heard the victim (PW3) crying bitterly from the hilltop. As she got closer, she noticed that PW3 and a person that she later identified as the appellant were undressed and that PW3 laid on the ground while the appellant was on top, sodomizing him. PW4 pulled the appellant as she screamed for assistance. People who responded to the alarm took the law into their own hands by administering a beating on the appellant. He was later taken to the hamlet chairman after which the matter was reported to the police. A medical examination carried out by PW2 found that PW3 had been molested and his anus had been severely damaged, leaving feces coming out uncontrollably. He concluded that a blunt object had penetrated PW3's anus.

After a police investigation, the appellant was arraigned in court 29th January, 2019, facing charges of unnatural sex to which he pleaded

not guilty. In his defence testimony, the appellant denied any involvement in the alleged incident, arguing that on the whole of the fateful day he was in the lake fishing, and was not aware of what happened. The appellant further contended that he met PW4 along the way and ordered those that gathered at the scene of the crime to beat him up as PW4 suspected that he was involved in the incident. At the end of the trial proceedings in which five prosecution witnesses testified, the trial court was convinced that the guilt of the appellant had been established. It convicted the appellant and sentenced him to life imprisonment.

Utterly dissatisfied with the decision that convicted and sentenced him, the appellant took an appeal to this Court. He has raised three grounds of appeal, reproduced in verbatim as follows:

1. *That, the identification against the appellant was not qualified to test as highlighted for by the law and precedent.*
2. *That, the PF3 had no evidential value to link or tending to connect the appellant in the charge, so the victim's evidence was not well corroborated through medical examination report.*
3. *That, the prosecution case was not proved beyond reasonable doubt.*

Hearing of the appeal was done virtually and it saw the appellant fend for himself, while Ms. Ghati Mathayo, learned State Attorney, represented the respondent. In a departure from the conventional way of conducting proceedings, the appellant chose to let the respondent submit first while he, the appellant, came last. This proposal was acceded to by the Court.

Ms. Mathayo's submission began with a preambular statement expressing her support of the trial court's decision that convicted and sentenced the appellant.

With respect to ground one of the appeal, the learned counsel submitted that the appellant was duly identified as he was known to PW3, the victim. He was also known to PW4, the victim's mother. He was not a stranger to the family. Ms. Mathayo further argued that PW3 named him by the name of Emma and that the appellant is same person he left with to buy a soda. She argued that there was no interference of any person who would be said to have perpetrated the act other than the appellant.

Ms. Mathayo further argued that the question of identification did not arise during cross-examination of PW3 and PW4, meaning that the appellant had no qualms with what had been testified on. Referring to the testimony of PW4, Ms. Mathayo argued that the said witness said that she

was at close range at the scene of the crime, and she saw the appellant who was arrested at the scene and sent to the hamlet chairperson. The learned attorney contended that the appellant is the same person who was arrested during the act, taken to the office and attempted to escape before he was apprehended. She argued that the appellant has not denied that he was the same person and that he admitted as much, during cross-examination, that he attempted to run away because he feared he would be beaten by an angry mob.

Submitting on ground two, Ms. Mathayo held the view that the law is clear on corroboration. Citing section 127 (7) of the Evidence Act, Cap. 6 R.E. 2019, the learned attorney contended that, in sexual offences, the evidence of the victim of the rape incident is enough, requiring no corroboration for the Court to convict. On this, she referred the Court to the case of ***Selemani Makumba v. Republic*** [2006] TLR 384. Ms. Mathayo argued that PW3, the victim, gave an eloquent account of how the appellant took him to the hill and sodomized him. He also narrated how he sustained injuries and taken to the doctor, PW2, for treatment. Ms. Mathayo contended that, based on this testimony, the case against the appellant had been proved and it did not require any corroboration.

With respect to ground three of the appeal, Ms. Mathayo's contention is that the case against the appellant was proved beyond reasonable doubt. She argued that the testimony of PW3, on how he was molested by the appellant through insertion of the latter's genitals into the anus; that of PW4, on how he found the appellant committing the act before she grabbed him and called for assistance was cogent and coherent enough to prove the offence. She further contended that PW2 inspected PW3 and found blood in his anus and testified that the anus, had enlarged, suggesting that there was an insertion of a big blunt object. Ms. Mathayo further argued that both, PW3 and PW4, mentioned the appellant as the responsible person.

Fortifying her arguments, Ms. Mathayo contended that none of this account of facts was challenged by the appellant. The learned counsel argued that the appellant's failure to cross-examine the witnesses on what they testified on amounted to an admission. On this, he referred me to the case of ***Daniel Ruhere v. Republic***, CAT-Criminal Appeal No. 38 of 2006 (unreported).

While acknowledging the legal principle that conviction cannot be imposed on the basis of the weaknesses of the defence, Ms. Mathayo argued that, in this case, no doubts were raised by the appellant to

discredit the prosecution's case, and that there was no evidence of any bad blood between him and the victim's family.

Making reference to the trial court's proceedings, Ms. Mathayo argued that the trial magistrate was better placed to assess the demeanor of the witnesses and that the proceedings (at p. 11) recorded how the victim was terrified and broke to tears when he saw the appellant, his tormentor, as it reminded him of the horrible pain that he suffered in the hands of the appellant.

With respect to the defence of *alibi*, Ms. Mathayo submitted that, while this defence was not considered, this Court can still consider it. She urged the Court to hold that the prosecution's evidence was sufficient to convict. Consequently, she urged the Court to dismiss the appeal and uphold the trial court's conviction and sentence.

The appellant was expectedly brief in his submission. He simply contended that his appeal is meritorious and urged the Court to allow it. He maintained that he was not involved in the incident that bred the charges. He prayed that his appeal be allowed and that he be set free.

The parties' contending submissions bring about one grand question. This is as to whether this appeal carries with any merits that justify the appellant's prayer for its allowance.

I will dispose this appeal following the sequence in which the grounds of appeal were argued.

The first ground decries the trial court's decision to convict the appellant while his identification did not conform to the requirements of the law. This contention has been scoffed at by the respondent's counsel, who holds the view that the circumstances of this case were such that identification was not required.

As gathered from the testimony of PW3 and PW4, the appellant took PW3 from his home ostensibly to go and buy a soda, only to take him to the hill where he was found indulging in a sodomy. He was arrested at the scene of the crime as he was in the act with PW3. Being a person who was known to PW3 and PW4 and in the abundance of evidence that he is the person who left with PW3 before he was found molesting him, the issue of identification could not arise. He was found committing the offence. It should be noted that since the purpose of identification is to link the accused person to the offence he is charged with, the fact that the appellant in this case, then the accused, was caught in the act sufficiently linked him to the offence that he came to be charged with.

More critically, the victim and PW4, both of whom were at the scene of the crime, named the appellant at the earliest opportunity, consistent with the holding in ***Marwa Wangiti Mwita & Another v. Republic***, CAT-Criminal Appeal No. 6 of 1995 (unreported), wherein it was stated as follows:

> *"The ability of a witness to name a suspect's name at the earliest opportunity is an all-important assurance of his reliability".*

I find this ground of appeal hollow and I dismiss it.

Ground two of the appeal queries the evidential value of the PF3. The contention by the appellant is that, in view of what the appellant considers to be anomalies on the medical report, the victim's evidence was not corroborated. The view held by the respondent is that the victim's testimony need not be corroborated.

Although the appellant has chosen to be economical with facts regarding the evidential shortfalls in the PF3, my unfleeting review of the proceedings reveals that, after the admission of the PF3 as exhibit PE1, the same was not read over to the appellant as the law requires. This omission denied the appellant of the opportunity of getting to know the contents of the exhibit. Such failure constituted a fatal omission which

rendered the evidential value of the PF3 vitiated. My view is predicated on the incisive holding of the Court of Appeal in ***Sprian Justine Tarimo v Republic***, Criminal Appeal No. 226 of 2007 (unreported), wherein it was held as follows:

> *"Another fatal flaw is that the contents of Exhibit P1 were not even read out to the appellant. So the appellant was convicted on the basis of evidence he was not made aware of although he was always in court throughout his trial. In our settled view, these two serious omissions which, unfortunately, escaped the attention of the learned first appellate judge,* ***wholly vitiated the evidential value of the PF 3. We shall accordingly discount it in our judgment."*** [Emphasis is added]

In view of the foregoing, I choose to discount the said exhibit PE1 in this decision.

Turning back to the other limb of this ground, I subscribe to the respondent's argument that the PF3 whose purpose was to corroborate the testimony of PW3, would not be necessary, taking into account that the trite position is that the evidence of the victim of tender age in rape offences is the most crucial and decisive force in grounding a conviction in rape case, and that the same need not be corroborated. This is a position which is premised on the provisions of section 127 (7) of the Evidence Act,

Cap. 6 R.E. 2019, and underscored in numerous decisions. In ***Bakari Hamisi v. Republic***, CAT-Criminal Appeal No. 172 of 2005 (unreported), the Court of Appeal held as hereunder:

> *".... Conviction may be founded on the evidence of the victim of rape if the Court believes for the reasons to be recorded that the victim witness is telling nothing but the truth."*

The same view was restated in ***Godi Kasenegala v. Republic***, CAT-Criminal Appeal No. 10 of 2008 (unreported) in which it was stated:

> *"It is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence."*

The exception to this cardinal rule is where credibility of the victim is questionable. Going through the record of proceedings in the trial court, nothing convinces that the testimony of PW3, the victim, suffered from any credibility crisis. In view of all this, I find this ground lacking in merit and I dismiss it.

Ground three of the appeal contends that the case against the appellant was not proved beyond reasonable doubt. This implies that the appellant's conviction was not based on the strength of the prosecution's evidence. The respondent has poured cold water on this contention,

arguing that the testimony of PW2, PW3 and PW4 presented a credible case and attained the level of sufficiency that can justify the decision that the trial court arrived at.

As I tackle this issue, it should not escape anybody's mind that, in criminal cases, the burden of proof is cast upon the prosecution. This imperative requirement has been underscored in a multitude of decisions of this Court and the Court of Appeal. In ***Joseph John Makune v. Republic*** [1986] TLR 44, it was observed:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."*

Accentuating this position was the Court of Appeal, yet again, in ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), in which it was held as follows:

> *"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs*

otherwise. Even then however, that burden is on the balance of probability and shift back to prosecution."

To gauge if the requisite threshold has been attained, the prosecution's testimony, taken in its totality, must be sufficient, cogent and credible. Crucially, credibility of the testimony from which conviction is to be grounded is measured by the coherence of the testimony of one or more of the key witnesses; and the way the same is considered in relation to the testimony of other witnesses. This position has been exquisitely underscored in ***Edson Mwombeki v. Republic***, CAT-Criminal Appeal No. 94 of 2016 (unreported), in which conviction of the appellant, as is the case in the instant matter, hinged on the credibility of the victim. In underscoring the importance of credibility of a witness, the superior Court made reference to its earlier position in ***Shaban Daudi v. Republic***, CAT-Criminal Appeal No. 28 of 2001 (unreported), in which it was held thus:

*"..... The credibility of a witness can be determined in two other ways. **One**, when assessing the coherence of the testimony of that witness, **two**, when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person ...."*

Reviewing the testimony of prosecution's witnesses, I spot nothing that can be said to militate against the requirements of credibility set out in the cited cases. Each witness's testimony is not only coherent with itself, but also when the same is considered with other witnesses. In this case, the testimony of PW4 and that of PW3 and PW2 were on the same wave length. It presented a story that is nothing short of credible and reliable.

I am not convinced, one bit, that there could be a better testimony to prove the prosecution's case than the totality of the testimony adduced by the said witnesses. I find this ground of appeal barren and I choose to dismiss it.

In the upshot of all this, I dismiss this appeal and uphold the conviction and sentence imposed by the trial court.

It is so ordered.

Right of appeal duly explained.

DATED at **MWANZA** this 18th day of January, 2021.

M.K. ISMAIL

JUDGE

Date: 20/01/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present through audio on 0756 212166

Respondent: Mr. Sarige, State Attorney

B/C: Paschal

Court:

Judgment delivered in chamber, in the presence of Mr. Sarige, State Attorney and through the appellant's virtual appearance on mobile phone No. 0756 – 912166, this 20th January, 2021.

M. K. Ismail

JUDGE

At Mwanza

20th January, 2021