

TANZANIA / JUDGMENT

Criminal Appeal No

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MTWARA AT MTWARA CRIMINAL APPEAL NO. 14426 OF 2024 (Arising from the decision of the
District Court of Masasi at Masasi in Criminal Case No. 89 of 2023) HABIBU YAHYA
WAZIRI..... APPELLANT VERSUS THE REPUBLIC.....
RESPONDENT

JUDGMENT

22th July & 19hAugust 2024 MPAZE, J.: On the afternoon of 6th July, 2023 Gadafi Said Juma (PW4), a child of tender age, was sent by his grandmother to buy "chenga za vitumbua" He asked the victim (PW2) (name withheld to protect his identity) and his younger brother to accompany him. It is said that while on their way, they encountered the appellant, who asked their names and where they were going. After they responded, the appellant informed them that he was on his way to visit his mother, where various animals and birds, such as hares, pigeons, and simbilisi, could be found. i The three young boys were curious to know if the appellant was selling the mentioned animals. The appellant gave them a satisfying answer, informing them that each animal and bird was for sale at different price ranging Tshs 1,000/= to 5,000/= depending on type of an animal. The boys then asked the appellant to show them the animals and birds, so they could purchase them once they had the money. According to their account, the appellant agreed, and the boys began to follow him. They reached a place where there was a salon, and the appellant entered, instructing them to first complete their errand and then return to find him there. They quickly bought the "chenga za vitumbua"&\& went back to the salon where they had left the appellant. This time, the victim's younger brother did not join them as he went toward Bomani Stadium, PW4 and the victim continued with the appellant, eager to see the animals he had described. PW4 testified that en route, the appellant asked him to deliver first what he had been sent at home, when PW4 returned he found the appellant and the victim were no longer there. PW2 explained that while they were on their way, following the appellant, they met their older brother, Abdulrahim Mohamed Mtipa (PW1), 2 who asked PW2 where he was going. PW2 replied that he was heading home, while the appellant was ahead of them. PW2 testified that after he was left alone with the appellant, they continued to the appellant's home. He stated that upon arrival, the appellant led him inside, claiming to be searching for the key to the main house. However, they stayed inside for a while, with the appellant telling him that he could not go outside because he had seen a woman who was claiming money from him, so he told him to wait

until that person had left. PW2 further stated that while they were still inside, the appellant asked him to name three things he didn't want the appellant to do to him. PW2 responded by saying that he didn't want the appellant to harm him, kill him, or send him to steal. After hearing these answers, instead of being shown the animals as agreed the appellant removed PW2's trousers and then undressed himself, after which he sodomized him three times. After finishing the assault, the appellant asked PW2 to stimulate his penis until it was erect, at which point PW2 lost consciousness. When he regained consciousness, the appellant told him to get dressed and then escorted him near his home before letting him go. 3 When PW2 arrived home, he found his sister-in-law and her children, but he did not say anything because the appellant had threatened him not to tell anyone. PW2 said while at home he felt a headache and decided to sleep. His sister-in-law, concerned about this, asked what was wrong, but PW2 did not disclose what had happened to him. The next day, PW2 met his brother, PW1, but still did not disclose what had happened to him. He continued going to school, but he stated that he couldn't go far due to a persistent headache. That's when he remembered Mama Mudi (PW3), a member of SUMAUJATA, an organization that fights against gender-based violence, who had previously advised them to report any wrongdoing to them. He then went to her home and told her about the incident. Upon receiving this information, PW3 reported the matter to Masasi Police Station, where a PF3 form was issued. PW3 then took PW2 to Mkomaindo District Hospital for a medical examination. At the hospital, PW2 was examined by Dr. Benjamin Mathias Sawaya (PW6). PW6 explained that during the examination of the anal area, he did not find any bruises or wounds. However, given the victim's complaints of 4 severe pain in the anus, he decided to perform a Digital Rectal Examination. Through this examination, he discovered that PW2 had been penetrated his anus by a blunt object. After leaving the hospital, PW3 contacted a Social Welfare Officer to help locate PW2's home in Nyasa Magengeni. They succeeded in finding the home and met PW2's guardian, who called the victim's sister. PW3 and the Social Welfare Officer then recounted all that had happened to PW2 before leaving. PW1, the victim's older brother, is the one who apprehended the appellant on 10th October, 2023. He stated that he learned about his younger brother's sodomization from his sister, Fatuma. After receiving this information, he called PW2, who narrated everything that had transpired, leading to the sodomy incident. PW1 further explained that PW2 described the person who committed the offence against him and even took them to the house where the incident occurred. PW1 said even the neighbours confirmed seeing PW2 with the appellant that day. PW1 also tendered PW2's birth certificate to prove his age, which was admitted as Exhibit Pl. 5 Abdillah Ali Said (PW5), the head teacher of Nyasa Primary School, testified that he knew the victim as a standard six pupil at his school, registered under registration number 20190115808 in the year 2019. He tendered the victim's progress report, which was admitted as Exhibit P2. This evidence led to the arrest of the appellant, who was later charged in the District Court of Masasi at Masasi with an unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap 6 RE 2022. The charge and the particulars of the offence being read to the appellant, he entered a plea of not guilty. When called upon to defend himself in light of the charge and the evidence provided, he fended himself without calling any witnesses or tendering any exhibits. In his defence, the appellant denied committing the offence, instead claiming that the case was fabricated by PW3, who accused him of stealing her belongings. At the

end of the trial, the court was satisfied that the offence had been proven beyond a reasonable doubt. Consequently, the appellant was found guilty as charged, convicted, and sentenced to 30 years of imprisonment. 6 The appellant was aggrieved with the conviction and sentence and thus appealed to this court fronting five grounds of appeal as follows;

1. That the trial court erred in law and fact by convicting and sentencing the appellant while the expert evidence of PW6 did not prove there was a penetration.
2. That the trial court erred in law and fact by convicting and sentencing the appellant on the corroborated evidence of PW4 who was 14 years old, that was recorded contrary to section 127 of the Evidence Act.
3. That the trial court failed to consider the appellant's defence.
4. That the trial court erred in law and fact by convicting and sentencing the appellant by relying on the weak evidence adduced by the prosecution evidence.
5. That the trial court erred in law and fact by convicting and sentencing the appellant while the prosecution did not prove their case beyond a reasonable doubt. At the hearing, the appellant appeared in person, unrepresented, whereas the respondent/Republic had the service of Ms. Florence Mbamba, the learned State Attorney. In the event the appellant was invited to submit his grounds of appeal, he generally argued that PW4 provided false testimony, claiming that there 7 was a significant discrepancy between the charge read against him and PW4's evidence. He highlighted that the inconsistency was in how PW4 described the circumstances under which they met, how PW4 claimed to have left him with the victim, and the types of animals described. He emphasized that the charge sheet mentioned rabbits, whereas the witness referred to them as "simbilisi" The appellant further argued that PW6, the doctor, testified that although he examined PW2, there was no evidence of penetration. He questioned how it could be claimed that he committed the offence when the doctor found no proof of penetration. In conclusion, the appellant prayed for the court to find that the charge was not proven beyond a reasonable doubt and to acquit him. In response, to addressing the first ground of appeal, the State Attorney opposed the appellant's complaint, arguing that PW6's evidence established penetration. She referred the court to page 40 of the proceedings, where the doctor testified, 'the anal examination indicated that the boy's anus was penetrated by a blunt object.' 8 On the second ground of appeal, it was conceded that the evidence of PW4 did not comply with section 127(2) of the TEA, as reflected on page 27 of the typed proceedings. However, the State Attorney pointed out that the law had been amended by Miscellaneous Amendments No. 11 of December 2023, which introduced section 127(7). This amendment states that the testimony of a child witness taken without compliance with subsection (2) of section 127 shall not be disregarded. She argued that although PW4, aged 14, did not take the oath, his testimony should still be considered under the cited amendment, as it supports the victim's account. PW4 testified that on 6th August, 2023 he was with the victim when the appellant took the victim away. Regarding the third ground of appeal, it was conceded that the trial court erred

by convicting the appellant without adequately considering his defence. However, the State Attorney argued that as a first appellate court, it has the duty to re-evaluate the evidence and reach a different conclusion if necessary, as established in the case of *Dr, Pandya v. R* [1957] EA 336. She urged the court to exercise this duty. 9 On the fourth and fifth grounds of appeal, the State Attorney opposed the appellant's claim that the prosecution had failed to prove the charge beyond a reasonable doubt. She argued that, in this case, the prosecution had successfully established the element of penetration through the testimony of PW2, the victim. Ms. Florence argued that PW2's testimony, found on pages 11 to 14 of the typed proceedings, described how, on 6th August, 2023 he and PW4 met the appellant, who invited them to his home to show them animals and birds for sale. However, PW4 went home first, leaving the victim alone with the appellant. Upon arriving at the appellant's home, the appellant took the victim inside, choked him, and sodomized him. PW2 testified that the appellant inserted his penis into his buttocks. The State Attorney argued that these words clearly indicate anal penetration by the appellant. To support this argument, she cited the case of *Hassan Kamunyu v. R* (Criminal Appeal No. TJ1 of 2016) [2018] TZCA 259 (21 August 2018), where the Court of Appeal clarified the different terminologies, victims may use to describe penetration. 10 The State Attorney added that the testimony of PW6, a doctor, found on pages 40 to 42 of the proceedings, indicates that on 7th August, 2023 he examined PW2 and observed that PW2 had been penetrated anally by a blunt object. She emphasized that this testimony substantiates that the victim was indeed penetrated. Regarding the perpetrator's identity, the State Attorney submitted that PW2 informed PW3 on 7th August, 2023 that he had been sodomized by Habibu, as shown on pages 20 and 21 of the proceedings. PW4, on pages 27 and 28, confirmed that on 6th August 2023, he and PW2 met the appellant, who invited them to his home to see animals. The State Attorney argued that after PW4 left, the appellant committed the offence against PW2. Based on this, Ms. Florence argued that the case against the appellant was proven beyond a reasonable doubt. She prayed that the fourth and fifth grounds of appeal be dismissed, and consequently, the entire appeal be dismissed for lack of merit. In rejoinder, the appellant argued that PW6's testimony did not prove penetration and pointed out inconsistencies between PW4's testimony and ii the charge. He opined that the prosecution's evidence had discrepancies and urged the court to examine these issues closely, implying the case had been fabricated, and prayed an acquittal. I have carefully considered the petition of appeal, the submissions of the parties, and the evidence recorded as provided in the trial court. Therefore, I find the main issue for determination is whether this appeal has merit. There is no dispute that the appellant was charged in the District Court of Masasi with the unnatural offence contrary to section 154(l)(a) and (2) of the Penal Code. As noted by the State Attorney, one of the elements required to be proved for this offence is penetration. Apart from establishing the penetration, the prosecution was required to prove that the appellant committed the offence and for the purpose of sentencing the age of the victim. These elements for proving unnatural offences were also underscored by the Court of Appeal in the case of *Safinati Simon Ndekoya @ Mdoka YjR* (Criminal Appeal No. 376 of 2020) [2024] TZCA 213 (21 March 2024), which stated; 12 '...Owing to the nature of the offence, it was incumbent upon the

prosecution to prove penetration of a male sexual organ into the victim's anus, the culprit and age of the victim.' The appellant complains that the prosecution failed to prove penetration, a complaint that Ms. Florence vigorously contested, arguing that the testimony of the victim and PW6, the doctor who examined the victim, sufficiently proved penetration. It is a settled principle in criminal law that the burden of proving the case beyond a reasonable doubt lies with the prosecution. This position has been discussed in various cases, including *Charles Mwinami v. R* (Criminal Appeal No. 451 of 2021) [2024] TZCA 231, where the Court of Appeal held; 'We take it to be settled law that it is a cardinal principle of law in criminal trials that the onus is always on the prosecution to prove the charge. The burden of proof never shifts to the accused, and the standard of proof is always beyond reasonable doubt.' Likewise, it is well-established law through various decisions that true evidence in sexual offences comes from the victim. This has been reinforced in number of decisions such as *Selemani Makumba v. R* [2006] TL 386, *Alfeo Valentino v. R* Criminal Appeal No. 92 of 2006 (unreported), *Shirimana Isaya & Another v. R* Criminal Appeal No. 459 of 2002 13 (unreported) and *Godi Kaseneqala v. R* (Criminal Appeal No. 10 of 2008)

[2010] TZCA 5 (2 September 2010). Along with the legal principle that the best evidence of rape comes from the victim, the same should not be taken as a gospel truth such evidence must be scrutinized by the court to test its coherence, credibility, and veracity in comparison with other available evidence to avoid wrongfully punishing innocent persons. In *Safinati Simon Ndekoya @ Mdoka's case* {supra} argued; '... whilst observing the rule that the best evidence in sexual offences must come from the victim articulated in *Seiemani Makumba v Republic* (supra) that principle must be weighed in the light of caution made by Lord Hald See also *Jovin Daud v. R* (Criminal Appeal No. 4821 of 2020) [2024] TZCA 97 (23 February 2024), *Majaliwa Ihemo v. R* (Criminal Appeal No. 197 of 2020) [2021] TZCA 304 (15 July 2021), and *Pascal Yoya @ Maqanqa v. R* (Criminal Appeal No. 248 of 2017) [2021] TZCA 36 (24 February 2021). It is a trite law that every witness is entitled to credence and must be believed, and their testimony should be accepted unless there are compelling and justifiable reasons for discrediting them. This principle was affirmed in *Goodluck Kyando v. R* (2006) TLR 363. Reasons to disbelieve a witness may include instances where the witness has provided improbable or implausible testimony, or when their evidence has been significantly contradicted by other witnesses. This was stated in the case of *Mathias Bundala v. R* Criminal Appeal No. 62 of 2004 (unreported). Turning to the current case, and keeping in mind that the most credible evidence of sexual offences comes from the victim, along with the caution that the court should not accept the victim's testimony in its entirety without careful scrutiny, I will first determine whether the element of penetration against the order of nature involving PW2 has been proven. To ascertain whether this element was established, I first considered the victim's testimony which as per cited authorities is considered the most credible. The victim stated that he was anally penetrated and described the incident as follows; While inside the appellant's house, the appellant undressed him and then inserted his penis into his buttocks three times. He said the appellant held his neck during the act. Afterward, the appellant told him to

stimulate his penis until it erect that's when he lost consciousness, and when he woke up, the appellant told him to get dressed and not to disclose what had happened. He then escorted him to a location from where he could see his home. He stated that when he arrived home, he had a headache and decided to sleep. His guardian, who is his sister-in-law, asked him what was wrong, but he did not respond. At this juncture, a thorough examination of PW2's testimony reveals that he does not mention experiencing any pain after allegedly being sodomized three times. Furthermore, his testimony does not indicate that he endured significant pain while walking home or that the pain was severe enough to impair his ability to walk properly. I am aware of the legal stance, as will be discussed later when addressing PW6's testimony, that a complaint of pain by a victim in sexual offence cases does not always prove penetration; this depends on the circumstances of each case. 16 In the present case, it is difficult to comprehend how such an incident could occur to a 9-year-old child, yet he failed to mention experiencing any pain or distress in his testimony. The absence of an explanation raises many unanswered questions but also undermines his credibility and reliability as a witness. Additionally, PW2 stated that upon arriving home, he had a headache and decided to sleep. When his guardian inquired about his condition, he remained silent. If he had indeed been sodomized, why did he not disclose this to his guardian when questioned about what was wrong? Also, PW2 stated that the next morning he met his brother, PW1, but still did not reveal what had happened to him. PW2 further claimed that he was afraid to tell his sister-in-law because the appellant had threatened him. However, his testimony does not specify any particular threats made by the appellant, other than telling him not to inform anyone. In my view, merely being told not to disclose the incident does not amount to a genuine threat that would have prevented him from reporting it promptly upon arriving home. However, his testimony shows that he 17 disclosed the incident to PW3 the next day. This raises the question of when the supposed threat lost its impact, allowing him to disclose the incident to PW3. The victim's failure to report promptly what happened to him and to identify the perpetrator reduces PW2's credibility and reliability regarding whether he was sodomized. In the case of *Marwa Mwita Wanqiti and Another v. R* [2002] TLR 39, it was stated that naming the assailant at the earliest opportunity assures reliability. Again in the case of *Akwino Mtavanqu @Baba Janeth v. R* (Criminal Appeal No. 379 of 2021) [2024] TZCA 233 (22 March 2024), the Court stated; '...that a delay by a witness to name at the earliest possible opportunity the person he knows to have committed an offence casts doubt.' Moreover, in his testimony, PW3 stated that he observed PW2 having difficulty walking and crying excessively. However, it is noteworthy that before PW2 reached PW3, he had met with PW1, his brother, who did not notice any difficulty in PW2's walking or signs of distress. 18 Another piece of evidence regarding penetration comes from PW6, the doctor who examined the victim. He noted that while no bruises or wounds were found during the examination, the victim's complaint of severe anal pain led him to perform the DRE. However, in his testimony, he did not specify the nature of the initial examination he performed, which failed to reveal any wounds or bruises. The DRE involves inserting a lubricated, gloved finger into the rectum to examine the rectum, anus, and prostate (in

males) for abnormalities. However, PW6's evidence is silent on the specific findings from the DRE, merely indicating that the victim had been penetrated by a blunt object, which is insufficient. Considering the purpose of the examination, PW6, the examining doctor, was expected to provide findings in two categories. For acute findings, he should have reported any tears, fissures, lacerations, bruising, abrasions, swelling, redness, blood, or discharge around the anus and perianal area. For chronic or healed findings, he should have described any scarring, skin tags, a dilated or relaxed anal sphincter, or abnormal gaping of the anus that does not contract normally. ¹⁹ These were the findings I anticipated after the DRE. However, PW6 provided only a general statement. He stated that after his initial examination showed no wounds or bruises, he performed a DRE and concluded that PW2 had been penetrated by a blunt object. PW6 did not, however, explain the basis for this conclusion. Alongside his oral testimony, the PF3 admitted as Exhibit P3 does not indicate the type of object used to penetrate the victim's anus. I expected this detail to be reflected in the PF3 if, as he stated, PW2 was penetrated by a blunt object. Upon closely examining the evidence of PW6, it reveals that he conducted the DRE due to the victim's complaint of anal pain. It should be noted that not every complaint of pain by a victim of a sexual offence necessarily indicates penetration, as stated in the case of *Akwino Mtavanqu* ©Baba Janeth v. R {supra}, that; 'We would add here that not every time a victim of sexual offence complains of suffering pains will amount to sufficient proof of penetration as the learned State Attorney wished us to accept.' Apart from PW6 being just a witness in this case, he is also an expert. The testimony he provided was professional, so he was required to explain ²⁰ how the medical examination led him to conclude that PW2 was penetrated, rather than offering a general account as he did in this case. Based on the evidence I have outlined above, I am unable to ascertain whether PW2 was indeed sodomized. This is due to the incoherence within PW2's own testimony and the inconsistencies between his testimony and that of other witnesses, as demonstrated below; One, if PW2 was indeed sodomized, why did he not disclose what happened to him immediately upon arriving home to his sister-in-law or when he met his brother (PW1)? Two, PW6 testified that he performed the DRE due to PW2's complaint of severe anal pain. However, in PW2's testimony, there is nowhere that he speaks of having anal pain; the only complaint he made was about a headache. Third, PW3 claimed that PW2 was not walking properly, but PW6, who examined PW2, found him physically fit. PW6 did not notice any difficulty walking when PW2 arrived at the hospital, and PW2 did not mention any walking issues or pain in his testimony. Similarly, PW2 met with PW1 before ²¹ reporting to PW3, and PW1 did not observe any difficulty in PW2's walking or signs of distress when they met. Four, while PW3 testified that PW2 named Habibu as the perpetrator, PW1 stated that PW2 described the perpetrator but did not provide a name. This discrepancy raises concerns about PW2's reliability. If PW2 was truthful about knowing the perpetrator's name, he should have named him to PW1 as well. The fact that PW2 named the perpetrator to PW3 but failed to do so with PW1 casts doubt on the consistency of his testimony. In light of the discrepancies and inconsistencies in the evidence, I have found PW2's testimony, as a key witness, to be neither credible nor reliable in proving that he was penetrated.

Additionally, the testimony from other witnesses did not adequately prove penetration against PW2. Considering that penetration is a crucial element in proving the offence for which the appellant was charged, and since this element has not been established, I cannot conclude that the prosecution has proven its case beyond a reasonable doubt. Therefore, this alone is sufficient to resolve the entire appeal. Consequently, I will not address the remaining grounds of appeal, as doing so would be a mere academic exercise. 22 Having said that, I find merit in this appeal. Accordingly, I quash the conviction and set aside the sentence imposed by the trial court. The appellant is to be released immediately from prison unless held for any other lawful cause. It is so ordered. Dated at Mtwara this 19th August 2024. Judge Court: Judgement delivered today in the presence of Ms. Florence Mbamba State Attorney and the appellant. Judge 19/8/2024 23

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