IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 55 OF 2012

SAID ALLY MTINDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Rutta, PRM.Ext Jurisdiction**)**

dated 20th day of September, 2011
in
PRM Criminal Appeal No. 9 of 2011

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JUDGMENT OF THE COURT

14th & 18th March 2013

ORIYO, J.A:

The appellant was convicted by the District Court of Singida at Singida of unnatural offence, contrary to section 154(1)(a) of the Penal Code, Cap 16, R.E. 2002. He was sentenced to serve a prison term of fourty five (45) years. Aggrieved, he appealed to the High Court. In terms of the provisions of section 45 (2) of the Magistrates Courts Act, Cap 11, R.E 2002, the appeal was transferred to a Resident Magistrates Court to be heard by R. I. Rutta, Principal Resident Magisrate, with Extended

Jurisdiction, (PRM, EJ). The learned PRM, EJ, reduced the sentence from 45 years to 30 years. The conviction was left undisturbed.

Still aggrieved he has come to the Court for a second appeal.

The facts which led to the appellant's conviction and sentence can be stated as follows.

On the fateful day, 25/5/2008 at around 17:00 hours at Mitunduruni area within Singida District, the victim, Selemani Athumani, a boy of 11 years, (PW2), was returning home from an errand he had been sent by his mother Chiku Ramadhani, PW3. While on the way, holding Shs.2,000/= in his hand, he found the appellant, whom he knew from before, sitting on a big stone, with a knife in his hand. The appellant summoned PW2 and threatened to throw the knife at him if he did not comply. PW2 obeyed. The appellant asked PW2 to give him the money he was holding. PW2 declined for the reason that the same belonged to PW3. The appellant then took the boy into a graveyard in the bush and gave him two choices either to be sodomised or be killed using the knife. The appellant undressed PW2 and sodomised him. In the meanwhile, the appellant covered PW2's mouth while threatening to kill him if he made noise.

Thereafter, PW2 returned home, and narrated the incident to PW3 who subsequently informed her husband, Richard Charles, PW1.

Steps were taken to inform the relevant authorities and PW2 was issued with a PF3. CW1, Dr. Peter Shango, who on the same date, examined PW2 at the Singida Government Hospital, found PW2 with fresh bruises in the anus, spermatozoa and red blood cells.

In his defence the appellant denied to have committed the offence, a stand he still maintained when he appeared before us. He was unrepresented. Mr. Ahmed Seif, learned State Attorney, represented the respondent Republic.

The appellant raised a number of issues in the memorandum of appeal lodged in Court which were similar and included the following:-

- The prosecution case was not proved to the required standard.
- The key prosecution witnesses were family members and their evidence lacked corroboration.
- Evidence of PF3 used to convict him did not state that it was the appellant who sodomised the victim, (PW2).
- Defence case not considered.

Mr. Seif, learned State Attorney, in submitting against the appeal, told the Court that the respondent Republic did not support the appeal. In his brief but focused submissions, he stated that the key witness in the trial was PW2, the victim, whose testimony was vital, because it was direct evidence on the incident which took place at about 17:00 hours, when there was still sufficient light for proper identification. He said PW2's evidence was watertight. PW2's testimony was corroborated by that of PW3 and PW1 who had inspected PW2 and confirmed the injuries he had sustained in the anus as a result. Further corroborative evidence was that of CW1, the medical doctor who had examined PW2 and confirmed that he had been sodomised.

The learned State Attorney concluded that the prosecution case was watertight and that there was no issue that PW2 was actually sodomised. The only issue which remained to be answered was as to who sodomised PW2 on the fateful day?

The learned State Attorney further submitted that on the strength of the prosecution evidence, it was the appellant who did it. He stated that it was the appellant, who was known to PW1, PW2 and PW3 from before as

they lived in the same area. And further, the appellant had stated that he had no grudges with the family of PW2 except for an unpaid debt PW3 owed him from his fish business. And on the issue of the debt, the appellant conceded that he never mentioned it in court but had complained to the street chairman about it, though, he did not call him to testify for him at the trial.

Who sodomised PW2? We begin with the general principle of law and practice that it is the prosecution's burden to prove its case beyond reasonable doubt. As the Court stated in the case of **Samson Matiga vs R,** Criminal Appeal No. 205 of 2007(unreported):-

> *"What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence".*

-See also **Yusuf Abdallah Ally v R,** Criminal Appeal No. 300 of 2009, (unreported).

It does not matter whether such evidence is from family members of the victim or otherwise because there is no law which prohibits same family

members from testifying so long as they are the people who were available and are **competent** and **credible.** In the instant case, PW1 and PW3 were the parents of, and the closest people that the victim trusted and freely confided in them on the incident.

In the case of **Ali Abdallah Rajab vs Saada Abdallah Rajab and Others** [1994] TLR 132, this Court held:-

> *"Where the decision of a case is wholly based on the* ***credibility of the witnesses then it is the trial court which is better placed to assess their credibility*** *than an appellate court which merely reads the transcript of the record."* (Emphasis ours).

We wholly subscribe to those views because it is the trial court which saw and heard the witnesses as they testified. Therefore the trial court is in a better position to asses their credibility than this Court. See also **Selemani Juma v R,** Criminal Appeal No. 31 of 2011, (unreported).

This complaint has no merit and is dismissed.

As regards the evidence of the PF3, it was the appellant's complaint that it did not state that it was the appellant who sodomised PW2. It should be pointed out here that Police Form No 3 is issued to a complainant of crime or to a person injured in an accident or in some

doubtful circumstances with a purpose of getting a medical opinion for further action and to avail medical services to the victim. The PF3 is issued early and in most cases before any other preliminary steps in the incident took place.

Under these circumstances, it would not have been possible to have the appellant mentioned in the PF3 as the perpetrator of the crime because it was too early and until a court of law makes a decision thereon and states so, the appellant remained a mere suspect. This ground lacks merit as well. It is dismissed.

The last complaint of the appellant was that his defence was not considered. This complaint has no **iota** of merit. According to the record, the trial court considered his defence including that of **alibi,** the evidence given by DW2, **Juma Hassan.** DW2 testified to have been with the appellant at a place called Singidani dam doing fishing. The learned trial Resident Magistrate considered the defence of **alibi,** rejected it and stated in conclusion:-

> *"From the foregoing as I have demonstrated, the prosecution evidence removes all possibility of*

mistaken identity and their evidence is watertight against accused defence".

And in mitigation, the appellant said:-

" I pray for court leniency, it is my first offence, I am a dependants, (sic) my father passed away. I have dependants. My old mother and my young sister and brothers. I will not repeat the same".

This complaint is devoid of merit as well and is dismissed.

For the reasons we have stated, we find no basis to fault the two courts below. We therefore dismiss the appeal.

DATED at **DODOMA** this 16th day of March, 2013.

E.M.K.RUTAKANGWA
JUSTICE OF APPEAL

B.M.LUANDA
JUSTICE OF APPEAL

K.K.ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

Malewo M.A.
DEPUTY REGISTRAR
COURT OF APPEAL