

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 522 OF 2016

JUMANNE S/O MARCO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Tabora)**

(Mallaba, J.)

dated the 16th day of November, 2016

in

Criminal Appeal No. 224 of 2016

JUDGMENT OF THE COURT

11th & 14th May, 2020

MWARIJA, J.A.:

The appellant, Jumanne Marco was charged in the Resident Magistrate's Court of Tabora with unnatural offence contrary to s.154(1)(a) of the Penal Code [Cap. 20 R.E. 2002] (now R.E. 2019). It was alleged that on 6/9/2015 at 11:30 hrs at Loya Village within Uyui District in Tabora Region, the appellant had carnal knowledge of "IB", a boy child aged 10 years.

The appellant denied the charge and as a result the case proceeded to a full hearing. Whereas the prosecution called four witnesses, the appellant relied on his own evidence in defence.

The background facts of the case are not complicated. On 6/9/2015 the child victim, who testified as PW1, (to be referred also as "the child") was grazing his father's cattle at Nzuiro area in Loya village. He was with his colleague named Juma Shija. While there, one person arrived and asked PW1 as to why they were grazing cattle in that area. That person claimed that the area was his shamba. He ordered Juma Shija to go home. The culprit then seized that opportunity to sexually assault PW1 by having a carnal knowledge of him against the order of nature. PW1 reported the incident to his mother who caused the appellant to be arrested by the Village's militia. The matter was reported to the police and the appellant was re-arrested and sent to the police station. He was re-arrested by E.9409 D/Cpl Charles who thereafter, wrote the appellant's statement and subsequently filed the charge against him.

In his evidence, PW1 testified that on the material date, he was with one Juma Shija at the time when the culprit arrived at the area where they were grazing cattle. The culprit then ordered the said Juma Shija to go home and when he left, the culprit started to slap him (PW1) then removed his clothes and forcefully had a carnal knowledge of him against the order of nature. It was PW1's further evidence that he

shouted for help but because he was in the forest, far from the village, he could not get any assistance. When he was re-examined by the prosecution, he said that he did not know the person who molested him but added that the culprit was known by his colleague, Juma Shija.

In that same day during the night, PW1's mother informed one Jonathan Loti (PW4) about the incident and asked him to examine the child. In his evidence, PW4 stated that he examined PW1's private parts by aid of torchlight and his examination revealed that the child had bruises in his anal area. PW4 testified further that he was told by the child that he was molested by the appellant.

It was the prosecution's further evidence that, on 7/9/2015, PW1 was taken to Loya Dispensary where Moshi Rashid, an Assistant Nursing officer examined him. That person testified as PW2. His evidence was to the effect that, after having examined the child and found that he was molested, he made a report in the P.F.3. That report was admitted in evidence as exhibit P.1.

In his defence, the appellant distanced himself from the incident leading to his arrest. He testified that, on 8/9/2015 he was required to report to the village office and when he went there, he was informed that he was accused of having sexually assaulted PW1. He denied the

allegation but he was later sent to the police and later the charge was preferred against him. He said that, since in his evidence the child said that he did not identify him at the scene of the crime, the evidence of dock identification was insufficient to be acted upon by the Court. It was his defence further that, when he was examined by a Doctor he was found to be HIV positive. He wondered why was the child found to be HIV negative if at all he had a carnal knowledge of him as alleged.

The trial court found that the prosecution had proved its case beyond reasonable doubt, particularly because the appellant was properly identified at the scene of the crime. In his judgment at page 34 of the record of appeal, the learned Resident Magistrate observed as follows:

"From those words above, that offence was committed during day time as testified by PW1 and it was committed while he was in cattle grazing while his fellow and managed to recognize the accused because it was day time and his fellow Shija who know the accused very well."

On that finding, the trial court convicted the appellant and sentenced him to 30 years' imprisonment.

Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His appeal was unsuccessful. Although it disregarded the evidence of PW3 on account that he was not listed at the preliminary hearing as one of the intended witnesses, it found that the evidence of the remaining witnesses (PW1, PW2 and PW4) was credible. With regard to the appellant's defence, the learned High Court Judge was of the view that the same was that of a mere denial that he did not commit the offence. According to the High Court therefore, the appellant's defence did not raise any reasonable doubt in the prosecution case. The appellant was further aggrieved by the decision of the High Court hence this second appeal.

In his memorandum of appeal, the appellant raised six grounds of appeal. Later on 12/2/2018 and 1/4/2020, he filed two supplementary memoranda of appeal consisting of two and three grounds respectively. For reasons which will be apparent herein, we do not intend to consider all the grounds of appeal raised by the appellant.

At the hearing of the appeal, which was conducted through video conferencing, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Tito Mwkalinga, learned State Attorney. When he was called upon to argue his grounds of

appeal, the appellant opted to hear first; the respondent's reply to the contents of his grounds of appeal and thereafter make a rejoinder, if the need to do so would arise.

Initially, the learned State Attorney expressed the stance that the respondent was supporting the appellant's conviction. In the course of submitting on the 6th ground of appeal however, Mr. Mwakalinga conceded that, had the trial court considered the appellant's defence, it would have come to the conclusion that the prosecution did not prove its case beyond reasonable doubt. In that ground of appeal, the appellant contended as follows:

"6. That, the two lower courts below erred in law and fact in disregarding my defence put on hence they reached to the wrong decision like this..."

As shown above, in his defence, the appellant challenged the prosecution evidence which was acted upon by the trial court to find that he was identified at the scene of crime as the person who committed the offence against PW1. According to the appellant's defence, PW1 had stated categorically that he did not know the person who molested him but that his assailant was known by one Juma Shija who was grazing cattle together with him at the scene of the crime.

The learned State Attorney conceded that, since the said Juma Shija was not called as a witness, the evidence as regards identification of the appellant was lacking. In the circumstances, he submitted that he was wrongly convicted as there was no other evidence linking him with the offence.

Having considered the contents of the 6th ground of appeal and the submission made thereto by the learned State Attorney, we agree that the trial court erred in finding that the appellant was properly identified at the scene of the crime. As can be discerned from page 15 of the record of appeal, when he was being re-examined, PW1 stated as follows: -

"who sodomized me was Jumanne (Accused) and when I rose (sic) noises no one came because it was very far in forest. I didn't knew (sic) him before, Juma Shija is the one who told me that he is Jumanne."

Indeed, it is obvious from PW1's evidence that he did not know the appellant before the date of the incident. The evidence suggests that the person who knew and identified the culprit at the scene of the crime was Juma Shija. For undisclosed reasons however, the said person was not called as a witness. In the absence of the evidence of

Juma Shija therefore, it was wrong to hold that the appellant was identified at the scene of the crime. In fact the prosecution's failure to call Juma Shija as a witness ought to have operated in favour of the appellant under the adverse inference rule. As held in the case of **Azizi Abdallah v. Republic** [1991] TLR 71:

"...the general rule and well known rules is that the prosecutor is under prima facie duty to call those witness who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

See also the case of **Mashimba Dotto @ Lukubanija v. The Republic**, Criminal Appeal No. 317 of 2013 (unreported).

That said, there is no gainsaying that, had the first appellate court properly re-evaluated the evidence, it would not have upheld the appellant's conviction.

On the basis of the foregoing reasons, we find that the 6th ground of appeal has merit and hereby allow it. Since the finding on that ground suffices to dispose of the appeal, we agree with the learned

State Attorney that the appeal has merit. In the event, the same is hereby allowed. Consequently, the appellant's conviction is quashed and the sentence is set aside. We order that he be released from prison unless he is otherwise lawfully held.

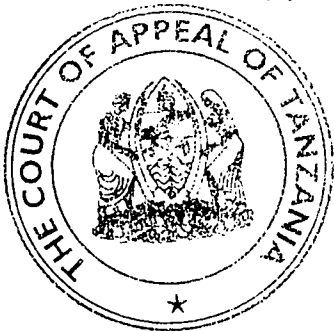
DATED at **TABORA** this 13th day of May, 2020.


A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This Judgment delivered on 14th day of May, 2020 in the presence of the Appellant in person via video conference and Mr. John Mkony, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL