IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: KWARIKO, J.A., GALEBA, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 224 OF 2022

YUSUPH JUMA KAYAGWA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Kigoma)

(Manyanda, J.)

dated the 31st day of May, 2022

in

(DC) Criminal Appeal No. 48 of 2021

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JUDGMENT OF THE COURT

24th April & 8th May 2024

GALEBA, J.A.:

Before the District Court of Kasulu in Criminal Case No. 264 of 2020, Yusuph Juma Kayagwa, the appellant was charged on two counts of having carnal knowledge of two young girls against the order of nature, contrary to section 154 (1) (a) and (2) of the Penal Code. The victims, whose identities we will conceal and refer to them respectively, as AB and CD or PW1 and PW2, were, at the time of the offence, aged 8 and 9 years, respectively. Upon a full trial, the appellant was convicted and sentenced to 40 years imprisonment on each count with an order

that the two sentences be served concurrently. His first appeal to the High Court was dismissed, and this appeal is contesting that dismissal.

The brief facts of the prosecution case at the trial, was that, on 2nd November, 2019 at around 3:00 o'clock in the afternoon, AB and CD were playing around AB's home at Mwilamvya village. Then, the appellant came by and told them to accompany him to Bogwe area for them to guard his bicycle, as he would be harvesting sugarcane stems. He promised to pay each of them TZS. 200.00 if they agreed to his proposal. The duo consented and accompanied the appellant to Bogwe, a secluded location with bushes and shrubs. Upon getting there, it turned out that, there was neither any sugarcane to harvest, nor was there any promised assignment to guard the bicycle. Instead, the appellant told both AB and CD to put off their underpants quickly, an order they complied with, without delay. Thereafter, the appellant bent AB forward in order to facilitate seamless and unhampered access of his male member to AB's anal organ. He then had carnal knowledge of her against the order of nature, as CD was watching. Then, it was CD's turn, he did the same to her, in the presence of AB. After the illicit acts, the appellant took his victims back to AB's home, and disappeared.

Upon meeting Modesta Joseph (PW5), her mother, AB narrated to her the ordeal she had endured with her friend. When she inspected her child, PW5 noted lacerations and dirt in her anal part. Efforts to trace the offender, did not succeed. The incident was reported to Kasulu Police Station, PF3s were issued, and they were then taken to Kasulu District Hospital on the same day, that is, on 2nd November, 2019 around 11:30 in the night. At the hospital, Beatrice Kasase (PW3) examined the victims and concluded that, they had had blunt objects inserted in their anal organs. About 8 months later, in July 2020, the police called PW5 to go to the police with the victims and see if the man who had been arrested in a different incident of rape, was the one who abused the children. They went to the police where the victims identified the appellant as the offender. That, briefly was the prosecution case.

On his part, the appellant denied committing the offence, saying that at the time he is alleged to have committed it, he was in prison having been arrested on 15th October, 2019 and charged in Criminal Case No. 345 of 2019. He challenged the manner he was identified, complaining that, the victims did not mention any of his peculiar features to any police officers before mounting the identification parade. He thus, moved the court to acquit him, but the reverse was true, he was convicted and sentenced as indicated earlier on.

As his first appeal was unsuccessful, the appellant lodged the present appeal in which he has raised 3 grounds of appeal, which may be paraphrased as follows; **one,** that the case was not proved beyond reasonable doubt; **two,** that the exhibits tendered left a lot to be desired and; **three,** that it was erroneous for the High Court to uphold his conviction without considering his defence of *alibi*.

At the hearing of this appeal, the appellant appeared in person remotely from Butimba Central Prison in Mwanza over the video conference facility. The respondent Republic had the services of Mr. Shabani Juma Masanja, learned Senior State Attorney, assisted by Mses. Antia Julius Muchunguzi and Naomi Joseph Mollel, both learned State Attorneys.

As the appellant preferred the respondent's side to respond to his grounds first, it was Ms. Mollel who was the first to argue in apposing the appeal. She submitted that in this appeal, the respondent's side was supporting only the conviction but not the sentence. At that initial stage she reserved her reasons for not supporting the sentence. Then, she started off with the first ground of appeal.

In reacting to the first ground of appeal, Ms. Mollel was brief. She contended that in cases of unnatural offence like the one before us, the

prosecution needs to prove existence of three ingredients; **one**, that there was penetration of the victim's anal part by a male organ; **two**, that the person who did so was the accused and; **three**, that the victim was below 18 years of age.

The learned State Attorney argued that in this case, all the ingredients were proved, and she started with penetration. She contended that PW1 and PW2 testified that the appellant told them to put off their underpants and had carnal knowledge of them against the order of nature, one after the other, which experience they testified to be painful. In addition, she stated that the evidence of PW1's mother, that is PW5 and the medical practitioner's evidence corroborated the victims' evidence on the issue of penetration. With this, the learned State Attorney was convinced that penetration as an ingredient of the offence charged, was adequately proved.

In respect of proof that the offence was committed by the appellant, Ms. Mollel argued that the appellant was adequately identified. She submitted that the offence happened during the day time and the victims had adequate time to identify the appellant who they previously knew by face although not by name. She specifically referred us to the evidence of No. WP 8210 DC Lizaligomba (PW7), who testified

at page 47 of the record of appeal, that she had been given all the peculiar features of the suspect that the victims had listed. In addition, the learned State Attorney argued that the appellant was identified at the identification parade that was supervised by Assistant Inspector Dominic Akwilini Mlolele (PW6) at Kasulu Police Station. With the evidence of these witnesses, Ms. Mollel submitted that, the appellant was, beyond doubt identified as the offender.

As for the third ingredient which is age, she submitted that the same was equally proved. On this, she referred us to the evidence of the clinical officer who said that PW1 was 8 years. She also referred to the record of appeal where PW1 and PW2 stated that they were both in primary school studying in class 4. With this, the learned State Attorney concluded that the victims were below 18 years of age at the time they were sexually abused.

Based on the above points, the learned State Attorney implored us to dismiss the first ground of appeal, and hold that the case against the appellant was proved beyond reasonable doubt and in terms of section 154 (2) of the Penal Code, the learned State Attorney implored us to enhance the sentence from 40 years to life imprisonment, because the victims were under 18 years.

In rejoinder, the appellant attacked the manner of his identification by the victims, stating; **first**, that PW1 stated that the person who abused them was called **Shabani Juma. Second**, he argued that PW1 identified him through the window while the children were seated at a place he did not know. He moved the Court to consider the record and his submission and dismiss the first ground of appeal.

In resolving this ground of appeal, the issue generally is whether, the case was proved against the appellant beyond reasonable doubt. Of particular emphasis, that we will closely examine, is whether the prosecution proved that it was the appellant who committed the offence, and did so beyond reasonable doubt.

In determining this ground of appeal, we have very carefully reviewed the entire record, particularly the prosecution evidence at the trial, and are in agreement with the Ms. Mollel and both courts below, that indeed PW1 and PW2 were carnally known against the order of nature. Also, noting all the circumstances of the case, especially the fact that the two victims were in standard 4, and also considering the evidence of PW3 that PW1 was 8 years in 2019, we are satisfied that PW1 and PW2 were children below 18 years, at the time they were sexually abused.

The hotly contested ingredient of the three, on which we will also spend a considerable amount of time, is whether it was proved beyond reasonable doubt, that the appellant was the person who abused the victims.

In that respect, the evidence of PW7 at page 47 was that she procured a removal order to be able to arrest the appellant in prison so that an identification parade could be held. PW7 also stated that, in locating the appellant, she was guided by a list of peculiar features of the appellant as had been narrated to her by the victims. However, when we asked the learned State Attorney as to the nature of the said peculiar features, she contended that PW7 did not mention any features that the victims told her that were peculiar to the appellant. We must state at this point, that the settled position of the law in this jurisdiction is that for an identification parade to be of any value, the identifying witness must have earlier given a detailed description of the suspect. See this Court's decision in **Idrisa Shaban v. R,** Criminal Appeal No. 101B of 2011 (unreported). In this case, although PW7 said that there was a description of the appellant's features, she did not mention the features for the trial court to know whether the same matched the actual appearance of the appellant. This defect compromised the credibility of the parade.

The integrity of the identification parade was further undermined by the evidence of PW1 and PW2. PW1 stated that she identified the appellant through the window at the police, whereas PW2 gave two versions; **one**, that she saw him at the police washing a motor vehicle, and; **two**, that she identified him at the identification parade. Such evidence cannot prove that the identification parade that was held, was at all, a credible criminal justice process, upon which a suspect could legally be convicted.

The identification of the appellant was further complicated by three more scenarios. The **first**, is the testimony of PW1 at pages 10 and 11 of the record of appeal, where she stated that a person who abused her and her friend was **Shabani Juma,** while the appellant's name is **Yusuph Juma Kayagwa**. In the absence of any further evidence from the prosecution showing that the appellant is also called **Shabani Juma**, the evidence of PW1 on that aspect, weakened the prosecution case.

The **second** scenario that eroded the competence of the prosecution case and strengthen the appellant's position, was the unexplained delay of about 8 months from 2nd November, 2019, when the offence was committed to 20th July, 2020, when the appellant was

arrested in prison and presented at the identification parade. PW7 who was the investigation officer never mentioned anywhere in her evidence, as to why the appellant was not arrested for all that time. It is a settled position of law that, an unreasonable delay to arrest a suspect must be explained by the prosecution and the court must address it. If that is not done, a material doubt is cast on the prosecution case. See this Court's decisions in **Chakwe Lekuchela v. R,** Criminal Appeal No. 204 of 2006 and **Mroni Mtwena v. R**, Criminal Appeal No. 116 of 2019 (both unreported).

The **third** point adverse to the prosecution case, is that the appellant testified at page 57 of the record of appeal that he was arrested on 15th October, 2019 and sent to prison in respect of Criminal Case No. 345 of 2019 and remained there until his arrest by PW7 in July 2020. This evidence was corroborated, hopefully unconscious of its implication, by PW7 that she arrested the appellant in prison on 20th July, 2020.

The defence of the appellant was further strengthened by the record of appeal at page 80, after he was convicted. When the appellant was given a chance for mitigation, the record shows the following from him and from the prosecuting attorney:

*"**Accused Mitigation:** I pray for mitigation as the date I am alleged to have committed this offence I was in prison.*

***PP:** The accused is now a habitual offender. **He was convicted of this offence in CC No. 328 of 2019 at Kasulu District Court.** In this regard, I pray the court to give a severe sentence to the accused."*

[Emphasis added]

In our view, in the absence of any credible explanation from the prosecution, showing that on 2nd November, 2019, the appellant was not held in any public detention facility, there is no reliable information before us worth of belief to demonstrate that, the appellant was not in prison when the offence was committed. In view of the above discussion, it cannot be stated that the case was proved beyond reasonable doubt. Thus, the first ground of appeal succeeds.

Finally, having allowed the first ground of appeal, we think considering the other two grounds, is of no logical consequence. Equally futile, would be an attempt to consider the respondent's prayer of enhancing the sentence to life imprisonment. Thus, we refrain from entertaining either of the points.

In conclusion, we allow the appeal and quash the appellant's conviction. We set aside his sentence of 40 years imprisonment, and order his immediate release from prison, unless he is held there for any other lawful cause.

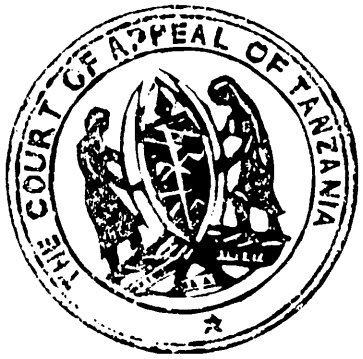
DATED at **KIGOMA** this 7th day of May, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 8th day of May, 2024 in the presence of the appellant appeared in person connected via video link from High Court Mwanza and Mr. Shabani Juma Masanja, learned Senior State Attorney assisted by Ms. Naomi Joseph Mollel, learned State Attorney for the Republic/Respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL