IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: NDIKA, J.A., GALEBA, J.A., And MGONYA, J.A.)

CRIMINAL APPEAL NO. 105 OF 2021

JOHN LEON KIMARIO.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mkapa, J.)

dated the 10th day of February, 2021

in

(DC) Criminal Appeal No. 54 of 2019

.....

JUDGMENT OF THE COURT

31st May & 6th June 2024

GALEBA, J.A.:

Before the District Court of Moshi (the trial court) in Criminal Case No. 9 of 2018, John Leon Kimario the appellant, was charged on a single count of unnatural offence contrary to section 154 (1) (a) of the Penal Code. The victim of the offence, according to the charge sheet, was a girl whose age at the time of the offence was 14 years. Having due regard to the fact that the nature of the offence was sexual, for purposes of protecting and preserving the victim's dignity and self-esteem, we will conceal her real name in this judgment, and refer to her, just as the victim or PW2.

In terms of the particulars of offence in the charge sheet, the prosecution case was that, on the dates that were unknown to them, between the months of July and November 2017, the appellant had carnal knowledge of the victim against the order of nature. As for the evidence, three witnesses testified; Catherine Lawrent Kimaro (PW1) PW2 and Shakira Rashed (PW3) a medical expert.

The brief facts of the case as per the prosecution is that, the victim was living in the same home as the appellant with her parents. On a day she did not remember in November 2017 at around 20:00 hours in the night, while in the kitchen cooking, the appellant approached her and asked for a hug from her, a demand she turned down. Thereafter, threatening the victim with a knife in case she would not obey whatever he would do, the appellant took hold of her physically, moved her to a nearby farm crop field, tore her skirt, undressed her underwear and laid her in a prostate position, a posture convenient for anal copulation. Next, he put off his own pair of trousers, laid over her, penetrated his manhood in the victim's anal organ. After the act, which was a painful experience to the victim, in firm and unwavering terms, the appellant warned the victim to never disclose what he had done, and if she would divulge the information to any third

party, he would kill her. The appellant denied committing the offence stating that, following a dispute between him and the victim's parents, the case was framed against him.

The trial court considered the evidence tendered and concluded that the case was proved beyond reasonable doubt. It found him guilty and convicted as charged. He was therefore sentenced to life imprisonment and to pay compensation of TZS. 200,000.00 to the victim. The appellant was aggrieved and lodged Criminal Appeal No. 54 of 2019 before the High Court at Moshi. Nonetheless, after expunging the evidence of PW3, the first appellate court dismissed the appeal and confirmed both the conviction and the sentence.

The appellant was aggrieved by the above decision, hence the present appeal to assail it. To do so, three sets of the memoranda of appeal were filed. Although the total grounds of appeal in this matter were 14, we will only consider one ground which was argued.

At the hearing the appellant appeared in person without any legal representation, whereas the respondent Republic had the services of Ms. Verediana Mlenza, learned Senior State Attorney, assisted by Mses. Agatha Pima and Julieth Komba, both learned State Attorneys.

At the outset, Ms. Mlenza informed us that the respondent's side was supporting the appeal based on the third ground of appeal in the first supplementary memorandum of appeal which was a complaint that the courts wrongly based the impugned conviction on the evidence which was at variance with the charge.

Ms. Mlenza submitted in support of that ground from a double pronged point of view; **one**, that the dates of committing the offence as per the evidence are at variance with the date mentioned in the charge sheet. **Two,** the evidence of the prosecution witness was too contradictory as to the date on which the offence was committed, to be accorded any credibility. She also submitted that the High Court erred when it expunged the entire evidence of PW3, upon a confusion on the names of the victim.

Going forward and broadening her perspective in support of the above points, the learned Senior State Attorney contended that, whereas the charge sheet is to the effect that the offence was committed on several occasions between July 2017 and November of the same year, each of the 3 prosecution witnesses, had a different version of the evidence on that aspect. She argued that; the **first** version is as per PW1, the mother of the victim who stated that the

victim informed her that she was raped three times in July 2017, and in November she was raped once. The **second** version is where the victim stated that she was raped for the first time in November 2017. The **third** account is by PW3, who said that PW2 told him that she was sodomized in June and July and that she was occasionally being sodomized. In conclusion, Ms. Mlenza submitted that the inconsistences in the evidence of the 3 witnesses, vitiated their credibility and their evidence could not sustain a valid conviction.

As indicated earlier on, the learned Senior State Attorney also observed that the High Court had no sufficient grounds to vacate the evidence of PW3, and we will start with this very point.

It will be recalled that at the beginning of this judgment, we highlighted the significance of concealing the actual name of the victim. This aspect, is inconsistent with a transparent discussion on the mix up of her name in the evidence of PW3. That is so because, in appropriate circumstances, for us to be able to make an order restoring the evidence that was vacated erroneously, the real name of the victim must be disclosed in the course of the discussion, in order to assess the gravity of the confusion. We take cognizance of the many decided cases of this Court, holding that every decision of the court must be backed by

reasons. That we encourage, particularly where the effect of the decision is to take away one's liberty or to adversely affect his interests. Nonetheless, in this case, we will deviate from that established rule, because of the undertaking we made; a commitment to hold the victim's name in confidence for the sake of protecting her self-esteem and decency. We think the duty of courts to protect the victim's self worth and dignity, is pursuit of a greater ideal, than performing their duties in a manner that would expose the victim shame and blemish her sense of pride in the interest of justifying its reasoning, only to satisfy judgment readers. In this case, we have not reached the decision haphazardly, we carefully ensured that neither the victim, nor the appellant will be adversely impacted by non-disclosure of the victim's name when dealing with this point.

Thus, without having to discuss how the first appellate court was not justified to vacate the entire evidence of PW3, we hold that the mix up of names of PW2 did not justify expunging the entire evidence of PW3. Thus, under the provisions of section 4 (2) (a) and (b) of the Appellate Jurisdiction Act, we reverse the first appellate court's order expunging the evidence of PW3 and hereby, restore it on record. Having

done so, we will now turn to consider Ms. Mlenza's arguments in supporting this appeal in view of the ground submitted upon.

The two points in our focus, are therefore whether the evidence of the three prosecution witnesses was contradictory, and if there were any contradictions, were they minor or major. The second point is; as neither PW1 nor PW3 was an eyewitness to the commission of the alleged offence, did their evidence have any value in law?

We will start with the issue that neither PW1 nor PW3 was an eyewitness to the commission of the offence. At page 10 of the record of appeal, PW1 the victim's mother testified that on 22nd December 2017 her husband told her that PW2 had been raped, then she went to the room where PW2 was sleeping and the latter confirmed to her that the appellant was occasionally raping her. However, going through the evidence of PW2, the victim, does not state anywhere that she disclosed to her mother any aspect of rape or unnatural offence. This fact renders, the evidence of the victim's mother hearsay, because, the only person who could corroborate it is PW2. The latter said to have confided only to her aunt called Maria. Now, in law hearsay evidence needs corroboration, otherwise it becomes offensive of section 62 (1) of the Evidence Act. Therefore, as the evidence of PW1, was not corroborated,

the same had no value and in no circumstance would it sustain any contention before any court of law.

Next is the evidence of PW3 we just restored. PW3 does not mention anywhere that PW2, told her to have been sexually molested. In fact, the victim does not say that she said anything to anybody at the hospital. She only, in a sentence or two, states that she was medically checked and was not given any medication.

In summary, as there is not a trace of evidence from the victim that she told either PW1 or PW3 any aspect of the offence, it means the evidence of the latter two witnesses is purely hearsay, thus hollow and useless. See this Court's decision in **Vumi Liapenda Mushi v. R,** Criminal Appeal No. 327 of 2016 (unreported).

The above said, there remains on record only the evidence of PW2. We are well aware of the general rule that in sexual offences, the best evidence is that of the victim as per **Selemani Makumba v. R** [2006] T.L.R. 379. That position has however over been qualified on several occasions including lately in the case of **Method Leodiga Komba @ Todi & Another v. R,** Criminal Appeal No. 150 of 2021 (unreported), where this Court stated that the evidence of a victim in

sexual related cases should not be taken as Scriptural Truth, the evidence must be credible.

The above authority is complemented by this Court's holding in the past that the evidence of a single witness may only be relied upon if the trial court is fully convinced that the evidence of that witness is nothing but the truth. See **Kennedy Owino Onyachi & Others v. R**, Criminal Appeal 48 of 2006 (unreported). However, being credible and truthful is one quality of a reliable witness, but ability to prove a charge, is yet another requirement for a conviction to be lawful.

Thus from now on, we will evaluate the only evidence available, that of PW2, and endeavour to show that the evidence was neither credible, nor did it prove the charge.

We prefer to start with the issue whether, the evidence of PW2 did prove the charge. According to the charge sheet, at page 1 of the record of appeal, as for the date of committing the offence or offences, it says:

> *"JOHN LEON KIMARIO on unknown **dates of July and November 2017** at Mbokomu area within Moshi District in Kilimanjaro Region, did have carnal knowledge of the victim, a girl of 14 years old against the order of nature."*
>
> [Emphasis added]

However, at page 15 of the record of appeal, in being led to prove the date, the witness stated:

> *"I was at the kitchen. He told me, in case I tell anyone, he could kill me.* ***It was the first time he raped me in November 2017,*** *I felt pain also I was discharging watery fluid....."*
>
> [Emphasis added]

Plainly, our understanding of the above evidence, is that the victim having been *"raped"* for the first time in November 2017, it cannot be said, that the charge of committing unnatural offence *"on unknown dates of July and November 2017"*, was proved. In the case of **Peter Ndiema and Another v. R,** Criminal Appeal No. 469 of 2015 (unreported), this case insisted on the importance of the prosecution to adduce evidence that proves the charge in order to ensure the fair trial of the accused person. In that case we stated that:

> *"a charge is the document which initiates criminal proceedings against an accused person. It is from the particulars of the charge wherein the prosecution is called upon by the court to tender evidence in establishment of the offence alleged to have been committed by the accused person. In the same vein, it is from the*

particulars of the charge, in which the accused person is required to defend himself"

See also the case of **Abel Masikiti v. R**, Criminal Appeal No. 24 of 2015 (unreported), where we stated that:

"... in a number of cases in the past, this court held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur."

In the same spirit, where an offence is alleged to have been committed on a wide range of dates, it is incumbent upon the prosecution to prove that indeed the offence was committed within that range. The case in point is **Vumi Liapenda Mushi** (supra), where we stated that:

"Another thing we noted in the charge sheet at page 1 of the record is that, it alleges that on different dates in the month of December, 2013, February

and March, 2014 the victim was sodomised by the appellant, however, ***in his evidence PW3 mentioned the incident to have happened only in the year 2013.*** *It is clear that there is variance in the charge and the evidence of PW3 which should be resolved in favour of the appellant."*

[Emphasis added]

The problem that faced the Court in **Vumi Liapenda Mushi** (supra), is more or less similar to the one facing us, in this matter where PW2 told the Court that, the appellant raped her for the first time in November 2017, while the charge states that the offence was committed in July and November. In this case we do not think the charge was proved, for there is a clear variance between the two; the charge and the evidence.

It is also pertinent, to make one observation in order to show that even if the evidence of PW1 and PW3 would not have been rendered valueless for being hearsay, the same would not have salvaged the case. This discussion will be very brief, and as indicated, it is for the sake of argument only as the evidence of PW1 and PW3 has already been adjudged weightless. We have just stated that PW2 said that she was raped for the first time in November 2017. Her mother's evidence at

page 13 of the record of appeal, stated that PW2 told her that the appellant raped her three times in July 2017 and one more time in November 2017. On his part, PW3 had also said at page 21 of the record of appeal that, PW2 told him that sodomizing her started in June and July 2017. Here the month of June which is not even in the charge is introduced. Now, on numerous occasions this Court has firmly stated as a position, that credibility of a witness or witnesses may be assessed by an appellate court by considering coherence of any one witness' evidence, and also by closely examining the consistency of the evidence of one witness *vis-a-vis* the evidence of another witness or of other witnesses. See this Court's decision in the case of **Toyidoto s/o Kosima v. R**, Criminal Appeal No. 525 of 2021 and **Kaiza Gaudin v. R**, Criminal Appeal No. 170 of 2022 (both unreported).

In this case, the evidence on the key aspect as to when the offence was committed, was so incoherent and collisional, such that no reasonable court could have legally acted on the evidence on that aspect. The contradiction in the evidence of the three witnesses was major and utterly schattered their credibility. In view of the above discussion, we uphold the third ground of appeal in the supplementary memorandum of appeal that was filed on 5th October, 2022.

In conclusion, we allow the appeal and quash the appellant's conviction. We set aside his sentence of life imprisonment and payment of compensation of TZS. 200,000.00. We finally order his immediate release from prison, unless he is held there for any other lawful cause.

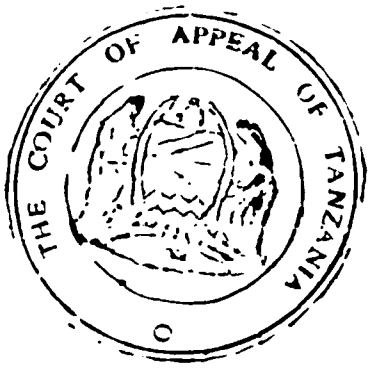
DATED at **MOSHI** this 6th day of June, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of June, 2024 in the presence of Appellant in person, unrepresented and Ms. Julieth Komba, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL