

**IN THE HIGH COURT OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA**

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 9 OF 2020

(Original Criminal Case No. 365 of 2018 of the District Court of
Singida at Singida)

SHABANI ATHUMANI @ LISU @ ALUTE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

30/6/2020 & 1/7/2020

JUDGMENT

MASAJU, J

The Appellant, Shaban Athumani @ Lisu @ Alute, was charged with, and convicted of the Unnatural Offence contrary section 154 (1) (a) of the Penal Code, [Cap 16] by the District Court of Singida (the trial Court). He was sentenced to serve thirty (30) years imprisonment, hence this appeal to the Court. The Appellant allegedly on the 29th day of October, 2018 at around 2100 hours at Mtisi area Mtamao village within Singida District did have carnal knowledge of one Onesmo Ramadhan Dule, a ten (10) years old boy against the order of nature, the offence which he denied.

The Appellant's Petition of Appeal is made of ten (10) grounds of appeal, including grounds No. 6 and 7 that the prosecution case against him was not proved beyond reasonable doubt.

When the appeal was heard before the Court on the 25th day of June, 2020, the layman Appellant appeared in person and adopted his grounds of appeal to form his submissions in support of the appeal praying the Court to consider his appeal accordingly.

The Respondent Republic through the service of the learned State Attorney, Ms. Phoibe Magili, contested the appeal. The Respondent argued that the prosecution case was proved beyond reasonable doubt by the evidenced adduced in the trial Court by Isaya Hashim (PW1), Martha Ntandu (PW2), Onesmo Ramadhan (PW3) and Deus John Nzela (PW4) and the Medical Examination Report (Exhibit P1), though the victim of crime's evidence was adduced before the trial Court in abrogation of the requirement of section 127 (2) of the Evidence Act, [Cap 6] since the said victim (PW3) did not promise to tell the truth and not lies before his testifying before the trial Court.

The Respondent prayed the Court to order the retrial of case so that justice be done accordingly.

In his Reply, the layman Appellant contested the Respondent's submissions that there should be a retrial of the case against him, for he has been in remand for quite a long time. He also prayed the Court to help him because he was a layman. That is all by the parties before the Court.

The court is of the considered reasoning and position that the prosecution case was not proved beyond reasonable doubt for want of credibility of the victim of crime's evidence who didn't promise to tell the truth, not lies prior to his adducing evidence before the trial Court contrary to section 127 (2) of the Evidence Act, [Cap 6]. By the time of the trial, the victim (PW3) was allegedly 10 years old boy, hence a child of tender age according to section 127 (4) of the Evidence Act, [Cap 6] whose evidence was conditioned to section 127 (2) of the Evidence Act, [Cap 6] which provides that a child of tender age may give evidence without taking an oath or affirmation but shall, before giving evidence, promise to tell the truth to the Court and not to tell any lies.

Section 127 (6) of the Evidence Act, [Cap 6] of the Evidence Act, [Cap 6] provides thus;

*"(6) Notwithstanding the proceeding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the Court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or that of the victim of sexual offence, as the case may be, on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings the **Court is satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth.**"*

In the instant case, it was impossible to assess and hold the victim of crime (PW3)'s evidence credible because he had not promised to tell the truth and not any lies before the trial Court. In such circumstances, the Court can not therefore be in a position of getting satisfied that the victim of sexual offence (PW3) was telling nothing but the truth when he testified before the trial Court. Due to non-compliance with the statutory requirement under section 127 (2) of the Evidence Act, [Cap 6] the purported evidence by PW3 is hereby expunged from the record. Once there is no longer the evidence by the victim of crime, the prosecution case evidenced could be solely hanging on hearsay evidence, which evidence cannot form basis of conviction.

The prosecution case evidence was also fraught with reasonable doubts. For example the offence was allegedly committed at 2100hours, on the 29th day of October, 2018 and made known to PW2, the victim's mother, on the following day when the victim disclosed that he had been carnally known against the order of nature by the Appellant who was their neighbour. Why then it took about a week to arrest the Appellant who has been all along there at his own home? The Appellant was arrested on the 4th day of November, 2018 there at his home. The medical examination was done on alleged victim of crime (PW3) on the 5th day of November, 2018 at 1 pm according the Medical Examination Report (Exhibit P1). If at all there had been such serious offence committed on the victim of crime, why it took about eight (8) days for him to be medically examined? The Medical Examination Report (PF 3) was issued on the 3rd day of November, 2018! Why the victim was not medically examined on the very date the

Medical Examination Report (PF3) was issued to him? In the said Report (Exhibit P1). The medical officer, Dr. Nzella who examined the victim recorded, thus;

"Has laceration on an anal verge"

In the Medical Practitioners Remarks, the said medical officer further recorded, thus:

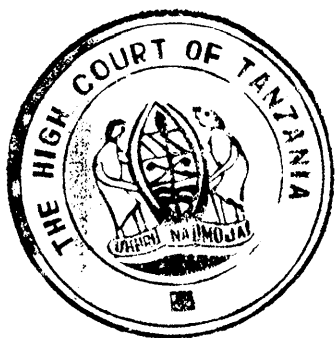
"From examination and findings suggest that he has been penetrated with blunt object on anus (there is signs of penetration)."

Could laceration on an anal verge be a proof to penetration by blunt object in the absence of the medical findings on the status of the anus sphincter muscles? Without the Court's further indulgence in the evidence by the Medical officer (PW4) and the Report thereof (Exhibit P1) it suffices to state here that the medical evidence leaves much to be desired because not all lacerations on anal verge comes from sexual actions and bearing in mind that the alleged victim of sexual crime was medically examined eight (8) days past the incident day.

During the trial the Appellant testified that, there was land ownership dispute between him and the victim's family. The said defence allegations notwithstanding, what is clear is that the prosecution case evidence against him was wanting. That being the case, the prayer for retrial, by the Respondent lacks merit.

The meritorious appeal is hereby allowed. The Appellant's conviction and thirty years imprisonment sentence, respectively, are hereby quashed

and set aside accordingly. The Appellant shall be released forth with from prison unless there is a lawful cause to the contrary.




GEORGE M. MASAJU

JUDGE

30/6/2020