

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(DISTRICT REGISTRY OF MTWARA)**

**AT MTWARA**

**CRIMINAL APPEAL NO 16 OF 2020**

*(Arising from Criminal case No. 36 of 2019 of Lindi District Court at Lindi)*

**MBARAKA MASUDI KAMPUNDA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**JUDGEMENT**

*Hearing date on: 14/5/2020*

*Judgement date on: 24/6/2020*

**NGWEMBE, J:**

The appellant Mbaraka Masudi Kampunda, preferred an appeal in this court against conviction and sentence meted by the District Court of Lindi. The appellant's journey of sixty (60) years imprisonment, commenced on unknown date of January, 2019 at Kariakoo area, within the Municipality of Lindi in Lindi Region, where he appellant was alleged to have carnal knowledge and unnatural offence to a girl of eleven (11) years old. The victim being a girl below the age of majority, her actual name is hidden in order to preserve her integrity, thus baptized into "ABC". Such offence

became known sometimes on May, 2019, consequently, the offender/appellant was arraigned in court, charged for two counts, that is, rape contrary to section 130 (1), (2) (e) and 131(1) of the Penal Code [Cap 16 R.E 2002 now referred to as Revised Edition of 2019], and the second count was unnatural offence contrary to section 154 (1) (a) of the Penal Code.

The trial court having so heard both parties, found the appellant guilty on both counts, subsequently sentenced him to thirty (30) years on the first count and thirty (30) years on the second count, forming an aggregate of sixty (60) years imprisonment and was ordered to compensate the victim to a tune of Tzs 600,000/=.

Being so aggrieved with such conviction and sentence, the appellant preferred an appeal in this court clothed with four (4) grounds which for convenient purposes may be summarized into two namely:-

1. The trial court erred in law and in fact in convicting and sentencing the appellant while the particulars of the offence did not disclose specific date, time and place where the incidence occurred.
2. That the trial court erred in law and fact to convict and sentence the appellant while the prosecution side failed to prove the case beyond doubt.

On the hearing of this appeal, the appellant appeared in person, while the Republic was represented by Mr. Paul Kimweri learned senior State Attorney.

The appellant briefly argued that, he never committed the offence and he was in the same village from January up to May, 2019 when he was arrested. Also at the same time the same child was alleged to have been raped and sodomized by Emmanuel Msemakweli who was also arrested on the same date, that is, 10/5/2019.

Further, confirmed that the parents of the victim are his neighbors, but for the period of four years were not in good terms. That should be the reason for such allegations.

On the adversarial side, the learned State Attorney supported the conviction and sentence meted by the trial court. On the admission of the testimony of PW1 aged 11 years, he argued that the trial magistrate properly recorded the evidence of the victim under section 127 (2) of the Evidence Act as amended. PW1 promised to speak truth and only truth. He cited a case of **Godfrey Wilson Vs. R, Criminal Appeal No. 168 of 2018** (CAT Bukoba), whereby in this case the court held that the child of tender age may promise to tell truth. Therefore this ground is irrelevant.

In relation to the charge sheet, that there was no specific date and place. He argued that section 132 of the CPA provide what should contain in the charge sheet. That the charge sheet comprised the offence and the

particulars of the offence that the offence was committed in January, 2019 at Kariakoo area within the Municipality and region of Lindi.

On the evidence of PW3 he argued that, medical examination did not take place immediately, due to the victim's failure to disclose the information to others. However, PW3 testified expert evidence, therefore, even without the expert evidence of PW3, the remaining evidences are enough. He invited this court in to the case of **Kabaragara & Another Vs. R, Criminal Appeal No. 128 and 129 of 2007** (CAT) (unreported), at Tabora, in page 10, whereby the court expressly distinguished the medical report with other evidences.

In the last ground, that the prosecution failed to prove the case beyond reasonable doubt. He argued that PW1 proved the case of rape that is penetration as per the case of **Hassan Bakari Vs R, Criminal Appeal 103 of 2012 (CAT)** Mtwara, where the court explained penetration as legal requirement in proving rape. Another important element of rape is proof of age of the victim as per the case of **Mathew Kingu Vs. R, Criminal Appeal No. 589 of 2015** (CAT) (unreported) at Dodoma.

He rested his submission by submitting that, on the allegation that there was another person accused on the same victim on the same time and on the same offence, such allegation is unfounded for they are not in the court record. Likewise, in regard to family conflict he answered as unfounded. In totality the learned senior State Attorney dismissed the

whole grounds of appeal and asked this court to confirm the conviction and sentence made by the trial court.

From the outset, the troubling issues are when the offence of rape and unnatural offence were committed and who committed that offence, if any? Lastly, what happened on 10/5/2019 until the offence was reported to police and later to Hospital? I am asking these questions for obvious reasons, due to serious contradictions of prosecution evidences and circumstances pertaining to the commission of the alleged offence.

Briefly, PW1 the victim, alleged that she was raped and sodomized by the appellant on unknown date of January, 2019. In her own words she said *"It was January, 2019 and it was a day not at night, and it was at his own house"* At the same time PW2 testified that he heard that her daughter is raped and sodomized on 10/5/2019, thus went to police and later to Hospital. PW4 being a teacher of Rahaleo Primary school, testified quite frankly, that on 10/5/2019 the Education Officer was looking for who had love affairs with "ABC". The teacher had no knowledge likewise the parents had no knowledge on love affairs of their daughter. Those piece of evidences did not answer the issues I raised above.

The evidence of the Medical doctor PW3, confirmed that he examined ABC on 10/5/2019 and found the victim had no virginity. Thus proving penetration into her vagina. The medical report was tendered in court, admitted and marked as an exhibit P1 and P2, both indicates that the victim was examined on 10/5/2019. However, those two reports which one

examined rape and another contained examination of unnatural offence alleged to have committed on January, 2019, equal to five (5) months prior to the medical examination. Such dilatory delay has no justification in fact and in law. In such circumstances, I may borrow a leaf from the Court Appeal's considered view decided in the case of **The Director of Public of Prosecutions Vs Simon Mashauri, Criminal Appeal No. 394 of 2017**(unreported) held:-

*"Another issue is linked with the PF3 which was admitted as Exhibit P1. PW1 was examined on 18/2/2013 which was two days after the incident took place. The problem arising here are that, **one** whether the examination could have revealed what had happened two days before. **Two** wouldn't there be any possibility of PW1 having sexual intercourse with another person between the alleged date of incident to the time PW1 was examined".*

in the same vein the Court of Appeal repeated in the case of **Johanes Kisulilo Vs R, Criminal Appeal No. 315 of 2017** (unreported), where the court held:-

*"From the above analysis it is clear that the prosecution side left a lot of questions which creates doubts as to whether the appellant is the one who committed the crime".*

The same circumstances occurred in this appeal. The victim was examined by a Medical Doctor after five (5) months from the date of the alleged event. An immediate question is whether the appellant is the one who committed the alleged offence? Whether there was no possibility that someone else could have committed that offence? This court takes judicial

notice that there is a similar allegations of the same victim on the same counts of offence decided by this court in Criminal Appeal No. 91 of 2019, where the appellant one Emmanuel Thomas Msemakweli was convicted by the trial court; It was alleged that sometimes on April, 2019 had carnal knowledge and unnatural offence with "ABC". Due to various contradictions found in the prosecution witnesses, this court decided in favour of the appellant and Msemakweli was ordered to be released from prison unless lawfully held.

In this appeal, assuming the offence was committed on January, 2019 and another similar offence was committed on April, why not possible, similar offence be repeated elsewhere by another man? I am sure had the trial magistrate directed his mind to the question of whether is safe to convict an accused person in such unexplained delay of more than five (5) months, since the occurrence of the alleged offence, he would have arrived into a different conclusion.

Another equally important question to ask is whether there was any reliable evidence established the offence of rape and sodomy? I have ventured to peruse with due care, the prosecution testimonies, but failed to find a single witness who testified a reliable evidence, which linked the appellant with the offence charged. I am aware on the legal principle that the best evidence on rape comes from the victim herself. However, if the court takes it fancifully, without due care, may result into injustice and victimization to innocent citizens. This position was also considered by the

Court of Appeal in the case of **Hamisi Halfan Dauda Vs. R, Criminal Appeal No. 231 of 2019** (unreported) held:-

*"we are alive however to the settled position of law that best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale. The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s)".*

Therefore, in this appeal, I would conclude that there was no evidence leave alone sufficient evidence to establish and prove the offence of rape and unnatural offence.

Equally important is the issue of where about the appellant from January, when he was alleged to commit the offence to May, 2019 when he was arrested? To answer this question, I have reviewed the evidences of witnesses paraded by the prosecution side to find if there is any explanation as to why they delayed to arrest the culprit/appellant immediate after the event of rape and unnatural act. Unfortunate there was no one volunteered to give clear explanation as to why the prosecutions delayed to arrest the appellant, while he was just in the same village and neighbour of the victim's parents from January to May 2019? My brother Judge Mzuna at one time was confronted with similar situation in the case of **Salum Seleman @ Bandari Vs. R, Criminal Appeal No.6 of 2013** (unreported) held:-

*"Also PW1 did not bother to arrest the appellant on that day despite of seeing him inside her toilet where her daughter came*



*from instead the appellant was arrested after 3 days passed while he was staying nearby. No explanation was given for the delayed arrest while the appellant was her neighbor.”*

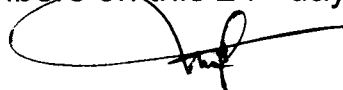
At the end the court decided in favour of the appellant.

Similar to the circumstances of this appeal, the alleged offence was committed on January, 2019, but the appellant was arrested on May, 2019 and there is no any explanation given by the prosecution before the trial court for that long delay. Therefore I would conclude that the alleged offence was not committed at all if same was committed, then it was not established and proved to the standard required.

With all what I have tried to demonstrate, I find that the prosecution evidence was marred with material contradictions and doubts which in effect weakened the prosecution case. All these doubts need to be resolved infavour of the appellant. I accordingly, allow the appeal, quash the conviction and set aside the sentence meted by the trial court, subsequently, order an immediate release of the appellant from prison unless otherwise lawfully held.

**I according Order.**

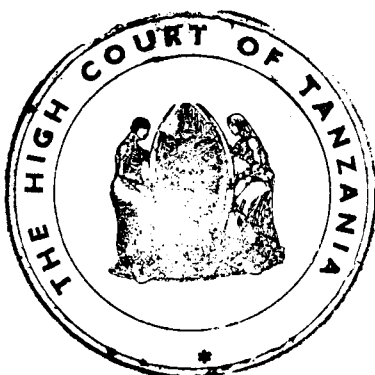
Dated at Mtwara in Chambers on this 24<sup>th</sup> day of June, 2020



**P.J. NGWEMBE**

**JUDGE**

**24/6/2020**



**Court:** Delivered at Mtwara in Chambers on this 24<sup>th</sup> day of June, 2020 in the presence of the Appellant and Mr. Paul Kimweri, Senior State Attorney for the Respondent.

**Right to appeal to the Court of Appeal explained.**



A handwritten signature in black ink, appearing to read "P.J. NGWEMBE", is written above the printed name.

**P.J. NGWEMBE**

**JUDGE**

**24/6/2020**