

**IN THE HIGH COURT OF TANZANIA**

**(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**(APPELLATE JURISDICTION)**

**(DC) CRIMINAL APPEAL NO. 136 OF 2020**

(Original Criminal Case No. 61 of 2019 of the District Court of  
Singida at Singida)

**JUMA IDDI @ NYUHA ..... APPELLANT**

**VERSUS**

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

*26/11/2020 & 16/12/2020*

**JUDGMENT**

**MASAJU, J**

The Appellant, Juma Idd @ Nyuha, was charged with, and convicted of Unnatural offence contrary to section 154 (1) (a) of the Penal code, [Cap 16] by the District Court of Singida where he was sentenced to serve life imprisonment, hence this appeal to the Court against both the conviction and sentence.

The Appellant's Petition of Appeal is made of nine (9) grounds of appeal including the 9<sup>th</sup> ground that the prosecution case against him was

not proved beyond reasonable doubt. The Appellant also attacks the prosecution case for being fraught with hearsay evidence and for want of credibility in the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> grounds of appeal. The Appellant also takes issue with his alleged identification in the 2<sup>nd</sup> and 7<sup>th</sup> grounds of appeal.

When the appeal was heard in the Court on the 26<sup>th</sup> day of November, 2020 the layman Appellant appeared in person and adopted his grounds of appeal to form part of his submissions in support of the appeal in the Court accordingly. In his rejoinder the Appellant just prayed the court to intervene in his appeal.

The Respondent Republic contested the appeal as the learned State Attorney, Ms. Neema Taji, submitted against the appeal arguing *inter alia* that the Appellant was unmistakably identified at the scene of crime by aid of light. He was also known to the victim of crime Anna Ally (PW1) and Juliana Ally (PW3) who are young sister of him and they had been living together. That, the said eyewitnesses were also able to identify the Appellant by his voice. The Respondent cited **Anuary Nangu & Kawawa Athuman V. Republic (CAT) Criminal Appeal No. 109 of 2006, Dodoma Registry (Unreported)**. That, penetration was proved by the prosecution through the evidence given by the victim of crime herself (PW1), Dr. Sarah Nkumbi (PW6) and the Medical Examination Report (Exhibit P2) thereof. The Republic also submitted that section 127 (2) of the Evidence Act, [Cap 6] was complied with accordingly when the children of tender age PW1 and PW3 testified before the trial Court. That, the age

of the victim of crime was proved by her mother, Elizabeth Athumani, (PW2) that she was 9 years old by the day she was carnally known against the order of nature by the Appellant. The Respondent prayed the Court to dismiss the appeal for want of merit. That is all by the parties.

The Court is of the considered position that the prosecution case evidence was too weak to ground conviction against the Appellant due to the following reasons thus,

First, whilst Anna Ally (PW1), allegedly the victim of crime, Juliana Ally (PW3), eyewitness, Elizabeth Athuman (PW2), Anna Ally's biological mother, and Luciana Lucus (PW4) testified that, Anna Ally (PW1) was carnally known by the Appellant on the 30<sup>th</sup> day of October, 2017 at 0400 hrs. and that Anna Ally's underwear was torn, she was bleeding passing stool uncontrollably, her anus discharging sperms like fluid and the she was uneasily walking that her condition was worse so much that she was admitted in hospital for about two weeks for medical attention, and that upon the sexual offence the victim of crime (PW1's) genitalia (Anus) was not washed, so as to stand as evidence, the medical Examination (Exhibit P2) reveals that by the 6<sup>th</sup> day of November, 2017 at 1600 hrs. when she was attended by the medical personnel, one Dr. Fredrick Sillo, Anna Ally (PW1) was in full conscious, with slight bruises on the anus, There was neither tear of clothes, blood stain no any fluids. The Report, upon examination reveals further that there were bruises **around** anus. There was neither bleeding nor discharge from the anus and that she tested HIV sero negative, The Medical Report (Exhibit P2) therefore substantially

contradicts the evidence adduced by PW1, PW2, PW3 and PW4 thereby affecting the would be credibility, if any, of the evidence given by them before the trial Court. The said medical Report does not state that the patient (PW1) was admitted in hospital for further medical management contrary to what is alleged by Anna Ally (PW1) and Elizabeth Athuman (PW2) her biological mother.

The Medical Report also does not state what was the cause of the **slight** bruises around PW1's anus. The author of the said Report one Dr. Fredrick Sillo did not testify before the trial Court allegedly his whereabouts being not known for the could be his summons before the Court. One Dr. Sarah Nkumbi (PW6) testified on his behalf. Her testimony thereof being essentially of hearsay carries insignificant value against the Appellant. The Court is of the considered positions that when the alleged Dr. Fredrick Sillo, was beyond reach, the investigation officer, if any, who recorded his statement, if any, was the one who could have testified before the trial Court pursuant to section 34B of the Evidence Act, [Cap 6]. The prosecution Exhibit P2 (The Medical Examination Report (PF3) was not read over to the Court upon its admission in evidence, that omission was a serious procedural irregularity which renders the Exhibit expungeable from the body of evidence of the trial Court had the Appellant contested its admission in evidence.


Secondly, the evidence by PW1 and (PW2) the children of tender age as per section 127 (4) of the Evidence Act, [Cap 6] was not subjected to

the requirements of section 127 (2) of the Evidence Act, [Cap 6] in that the two witnesses did not promise to tell the truth and not lies to the trial Court prior to their testifying thereat. The procedure adopted by the trial Court was that of *voire dire* examination which procedure is no longer applicable as per of section 127 (2) of the Evidence Act, [Cap 6]. The result thereof is that the evidence by PW1 and PW2 is hereby expunged from the body of evidence before the trial Court. Once that is done, the prosecution case is left with nothing of evidential value to sustainably implicate the Appellant with the crime he has all along been contesting. In the absence of the said witnesses promise to tell the truth and not lies to the trial Court, the Court cannot be in a position with certainty to appreciate as to whether or not the said witnesses (PW1 and PW2) were witnesses of truth and credibility in terms of sections 115 (3) of the Law of the child Act, [Cap 143] and section 127 (6) of the Evidence Act, [Cap 6].

Being a victim of sexual offence or a child of tender age victim or witness of sexual crimes or being adult victim or witness of sexual crime in itself does not take away the solemn obligation on the part of the victim or witness of sexual crime to give credible and truthful evidence. And for that matter the prosecution is also not absolved from the solemn duty to prove the case beyond reasonable doubt in such sexual offences as the practice in criminal justice demands. That is the essence of sections 115 (3) of the Law of the Child Act, [Cap 143 R.E 2019] and sections 127 (2) (6) of the Evidence Act, [Cap 6 R.E 2019].

That said, the meritorious appeal is hereby allowed, the conviction and sentence against the Appellant are hereby severally quashed and set aside accordingly. The Appellant shall be released forthwith from prison unless there was a lawful cause to the contrary.



  
GEORGE M. MASAJU

**JUDGE**

16/12/2020