

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 223 OF 2018

(Arising from Ilala District Court, Criminal Case No. 24 of 2016)

ASINANI KONDO @DINGO.....1st APPELLANT

FABIAN CHARLES KISAGA.....2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 27/10/2019

Date of Judgment: 23/3/2020

S.M. KULITA, J.

This is an appeal originating from Ilala District Court, Criminal Case No. 24 of 2016. The appellants ASINANI KONDO @DINGO (hereinafter to be referred as the 1st appellant) and FABIAN CHARLES @KISIGARA (hereinafter to be referred as the 2nd appellant) were convicted and sentenced to serve 30 years imprisonment for the “Gang Rape” and “unnatural offence”

contrary to section 130(1)(2)(e)(ii), section 131(1) and section 154 (1)(a) and (2) of the Penal Code [Cap 16 RE 2002].

The background of this matter is the allegation that on the 21st day of November, 2015 at Pugu Check point area, within Ilala District in Dar es Salaam Region, the appellants had a carnal knowledge against the order of nature of one KURUSUMU ISAYA.

Being aggrieved with the decision of the said court, the appellants appealed to this court against both conviction and sentence.

The 1st appellant lodged his appeal comprising seven grounds whereas the 2nd appellant lodged five grounds of appeal challenging the decision of the aforementioned case.

During the hearing of this appeal the 2nd appellant enjoyed the services of Ms. Sakina Sinda, Learned Advocate, while the 1st appellant was unrepresented. The respondent (Republic) was represented by Ms. Jenifer Masue, Learned State Attorney.

In his oral submissions, the 1st appellant submitted by praying for his grounds of appeal to be adopted as the submissions for his appeal.

Ms. Sinda, advocate for the 2nd appellant submitted with regard to the first ground of appeal that the trial Magistrate did not consider the fact that the trial court used the contradictory evidence of the prosecution to convict the appellants. She submitted that the first contradiction is on the testimonies of PW1 who said that the incident happened on 22/11/2015 at 0330 hours while PW2 said that it was 0230 hours. She said that the said difference of time of one hour is so great. The trial court was therefore wrong for not considering the same.

Ms. Sinda further submitted that there is also a contradiction on the PF3 (Exhibit P1) which shows that the victim was taken to two different hospitals on two different dates, the incident happened on 22/11/2015 and the victim got treatment on 23/11/2015 at the FFU Ukonga hospital and Kisarawe District hospital on 25/11/2015. At page 25 of the proceedings of the lower court PW3 (the doctor) testified that he received the victim on the 25/11/2015, that is three days later for medical examination and treatments whereby the PF3 was filled. Ms. Sinda submitted that the victim's act of attending two different hospitals creates a doubt on the authenticity of the PF 3 that was tendered to court.

With regard to the second and third grounds of the 2nd appellant's appeal that the witnesses failed to give favorable factors for identification of the appellant and that the conditions were unfavorable for identification Ms. Sinda submitted that the evidence transpires that the crimes were committed during the late night hours. She furthermore stated that one of the 2nd appellant was arrested at the scene but the arresting officer was not called to testify.

Arguing on the fourth ground of appeal Ms. Sinda submitted that the court sentenced the 2nd appellant contrary to the law as section 131 (1) of the Penal Code states that if the sexual offence is committed by the person who is under 18 years and he is the first offender he should be sentenced to corporal punishment. She further submitted that it was not proved in the charge sheet that the 2nd appellant was 18 years. She said that the 2nd appellant was 15 years by the time he was charged and that argument was raised but the trial Magistrate did not consider it. Hence he was wrongly sentenced.

Ms. Sinda concluded that the case against the 2nd appellant was not proved beyond all reasonable doubt, hence prayed for this

court to quash the conviction and set aside the sentence for the 2nd appellant.

In reply to the Learned Advocate's submissions, the Learned State Attorney Ms. Jenifer Masue started to submit by conceding the appeal. She stated that the substituted charge sheet dated 08/02/2015 shows that the appellants were charged with two counts, rape and unnatural offence, in which during the proceedings PW2 testified to the effect that she was raped and sodomized. However the offence of rape was not proved. She went on to submit that the evidence of a Doctor (PW3) transpires that the victim had no bruises in her vagina. She said that under normal circumstances it was expected even after the lapse of three days the signs of bruises could be there. She further stated that the only proof as per the doctor's testimony and the PF3 that he had filled is the penetration in the victim's anus. She further said that the doubt is that even the bruises that were found in the victim's anus on the examination date, that is 25/11/2015 showed that they were less than 24 hours period of time back while the incident occurred on 22/11/2015 which is the 3rd day back.

With regard to the issue of identification, the Learned State Attorney submitted that it is undoubtedly that the incident

happened at night but the source of light has not been explained by the prosecution witnesses. She said that PW2 testified that there were six persons who had raped and sodomized her. She also stated that she knew the first appellant but she failed to justify before the court how she identified the second appellant. That issue of identification was not properly proved against the 2nd respondent.

The Learned State Attorney submitted that it is fatal for the prosecution side failing bring the watchman, the key witness who had arrived at the scene and assisted PW1 when PW2 was carnally known.

As for the issue of age of the 2nd appellant that when he was sworn he was 17 years old the Counsel submitted that it was necessary for the court to inquire on the exact age of the 2nd appellant.

The learned State Attorney concluded by praying for the appeal to be allowed, conviction quashed and the sentence set aside for both appellants.

In the rejoinder submission the 1st appellant had nothing to add while the Learned Advocate for the 2nd appellant submitted that

according to section 131(2)(a) of the Penal Code the penalty for the 2nd appellant was supposed to be corporal punishment. The trial court had to consider it while imposing the sentence to the 2nd appellant.

From the submissions I hereby start to analyze the issue of medical examination for the victim in respect of the unnatural offence which is said to have been proved against all accused persons (appellants) according to the findings of the District court. Among the things that have been challenged by the 2nd appellant's Advocate, Ms. Sakina Sinda and conceded by the Respondent's counsel, Ms. Jenifer Masue is the fact that that the PF3 (Exh. P1) which was used as part of the evidence that led to a conviction has no connection with the case. As rightly submitted by those counsels the records transpire that incident of sodomy happened on the 22/11/2015 but the victim (PW2) was examined by the Doctor at Kisarawe District Hospital on 25/11/2015, Exhibit P1 refers. There are no reasons submitted at the trial court as to why the medical examination was not conducted immediately.

Another thing which was rightly submitted by the counsels of which I wish to comment is that the testimony of the Medical Doctor (PW3) reflects that the bruises that he had observed in

the victim's anus on that 25/11/2015 had been generated not more than 24 hours back. The concept that one can get is that the incident alleged to have been committed on 22/11/2015 has no connection with the PF3 which was tendered to court in respect of this matter. I don't say that the PF3 is not genuine. It can be genuine but in respect of another incident known to the victim as it is possible for another penetration to have been done in the victim's anus within that period of time ranging between the 22/11/2015 and 25/11/2015. According to the Doctor's testimony that by the time he was filling the PF3 on that 25/11/2005 the bruises had not yet attained 24 hours duration since they were caused. It means the allegation has no connection with the incident happened within a period which does not exceed 24 hours back.

The above reasons are sufficient to dispose of this appeal. I find it unnecessary to deal with the submissions for the other grounds of appeal.

It is trite law that the prosecution side is duty bound to prove its case beyond all reasonable doubts. Leaving such kind of doubts as aforementioned, weaken their case. In the case of **MOHAMED SAID MATULA V REPUBLIC [1995] TLR 3** it was held;

"In criminal cases like this one, the burden of proof is always on the prosecution, it never shifts and no duty is cast on the appellant to establish his innocence"

Having said so, I find this appeal has merits, I hereby quash the conviction and set aside the sentence of the lower court and acquit the accuseds/appellants forthwith. They are to be set at liberty unless otherwise held in other lawful cause.

Appeal allowed.



A handwritten signature in black ink, appearing to be "S.M. Kulita", written in a stylized, cursive script.

S.M. KULITA

JUDGE

23/03/2020