

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 218 OF 2020

*(Arising from decision of the District court of Bukombe District at Bukombe
Criminal Case No. 351 of 2019 Before Hon. Mchunguzi, RM)*

MAKOYE CHIZA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

19/04/2021 & 17/05/2021

W. R. MASHAURI, J;

In the District, court of Bukombe the appellant in this appeal Makoye s/o Chiza was tried and found guilty for the offence of unnatural offence c/s 154 (a) and (2) of the Penal Code Cap. 16 R.E. 2002 the consequent upon which he was sentenced to serve life imprisonment.

Aggrieved by both the conviction and sentence, the appellant now appeals to this court against both conviction was sentence.

Notwithstanding that the prosecution evidence is hardly recorded by the trial court magistrate, the same is to the effect that, on 10/11/2020 one

Robert Mapande Sent lisu (PW2) his son to collect tobacco. Along the way. Lisu met with the appellant who asked Lisu a boy of 10 years to assist him to carry a calf to the nearby place. Lisu admitted the request. Being innocent on what he would befall him, Lisu was grabbed by the appellant and gagged him into the bush where he was carnal knowledge known by the appellant against the order of nature. He was sodonized by the appellant.

Upon being sodonized by the appellant, Lisu went back home immediately and told PW1 of what had befall him. PW1 is father of the victim. He said that, on the material day 16/11/2019, he enjoined the victim to go to his neighbour Mzee Juma to collect tobacco. That although Mzee Juma is his close neighbor the victim took long to return back at 18:00 hrs crying and he told him that, along the way and upon reached a place where there is a bush, he met with a young man who asked him to carry a calf of cow. The victim who is his son (victim) told him that, upon reached the bush that man grabbed him and stripped off his clothes and inserted his erect penis into his anus and carnal knowledge know him. When the victim told him so, he inspected him and found him oozing blood in his anus and had sustained bruises. PW1 reported the matter at Runzewe police station where the victim said upon interrogated by a police officer that, he knows the appellant by his

face. At Runzewe police station the victim was provided with a PF 3 and they took the victim to Uyovu health center for examination. The victim said he knows the appellant very well.

On 12/11/2020 when looking for other young men they saw the appellant and he was identified by the victim to have sodonized him.

On his part, the victim Revocatus Robert (PW2) upon promised to tell the court the truth said in his testimony that, on 10/11/2016 was enjoined by his father (PW1) at about 16:00 hrs to collect tobacco to Mzee Juma. Along the way he saw the appellant in thickets (nilimuona vichakani) upon reached the place where the accused was he stopped and asked him if he could be able to carry a calf (ndama) and he agreed the appellant asked him if he knows his name and he said not. No sooner had the victim said that he don't know his (appellants) name then the appellant stopped of his shorts (alimuona kabutura) and he threatened to kill the victim had he raised a hue and cry. The appellant then grabbed him and fell the victim supine, lie on top of him and in sent his pens into his Pens. ***"akaniingizia dudu oale kwenye mkundu"***. He felt pains and thereafter, he went him and told his father (PW1) and they looked for the appellant and arrested him, and he (victim was taken to Hospital. The victim's evidence was backed up Isaka

Muzuka (PW3) the village chairman and resident of Bwende village and Simon Kulwa (PW4 a clinical officer of Uyovu health centre Runzewe who examined the victim on 10/11/2019. He tendered in evidence a PF3 and was admitted and marked exh. PE-1. That the child he examined was 8 years of age.

The issue is whether the prosecution has proved its case against the appellant.

In his defence the appellant Makoye Chiza said was on the material day at Bwenda grazing cows. While grazing was reached by a group of about 5 persons including a child. They asked him whether he knew the child but he refused. Having refused to have known the child he was arrested and charged with the offence of unnatural offence. He was amazed.

It is known in this case that the victim of the matter is a child of 8 years.

It is guided by the Court of Appeal in the case of **Daffa Mbwana Kedi V/s R. Criminal Appeal No. 65 of 2017 CAT Tanga Registry** (unreported) that:

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"the true evidence of rape has to come from the prosecutrix (the victim) herself. A woman her consent is required and a girl where consent is immaterial"

In this matter as I have said above the victim of sodomy is boy of 8 years old. On that regard, consent is material.

On that regard, I would therefore say that his evidence that he was sodonised by the appellant is true.

Basing on the decision by the Court of Appeal in the case of **Daffa Mbwana kedi** (supra) I find the appellant's devoid of merit the same is dismissed.

Having dismissed the appellant's appeal, I have considered the sentence of life imprisonment imposed on the appellant. The issue I have raised upon dismissing the appellant's appeal is whether the life imprisonment sentence imposed on the appellant is relevant to the gravity of the offence committed by the appellant.

On my part, I find the life sentence ruling of the High Court is not attached by the purported applicant or appellant.

However, having been answered my issue whether the prosecution had proved its case against the appellant, bearing in mind the case of **Daffa**

Mbwana Kedi (supra) I find the appellant's appeal devoid of merits. The same is dismissed.

Having dismissed the appellant's appeal, I have considered the sentence of life imprisonment imposed on the appellant. The issue I have raised upon dismissing the appellant's appeal is whether the life imprisonment sentence imposed by the trial court on the appellant is relevant to the gravity of the offence committed by the appellant.

On my part, I find the life sentence not proportional to the offence committed by the appellant. Having so found, I therefore found it prudent to interfere with sentence.

Of course I am aware with, the guiding principle that, an appellate court including the court of Appeal of Tanzania must not interfere with a sentence which has been assessed by a trial court unless such sentence is illegal or the sentencing court followed a wrong principle or failed to take into account the important mitigating factors such as that, the convicted person is first offender, the period he spent in custody before being convicted and sentenced, his age, and health and other notorious extenuating circumstances, like the fact that, a convicted person readily

pleaded guilty to the offence and thereby demonstrating remorse. A sentence which is manifestly excessive or patently inadequate may be altered on appeal.

In this case the appellant is first offender. There is no previous record of criminality on him. The sentence of life imprisonment is manifestly excessive, bearing to the offence committed by the appellant.

In the event, I reduce the sentence of life imprisonment imposed to the appellant to that of 30 years' imprisonment, the sentence of which is mandatory at law. The appeal against sentence is hereby therefore allowed and the appeal against conviction is dismissed.



W. R. MASHAURI

JUDGE

17/05/2021

Date: 17/05/2021

Coram: Hon. w. R. Mashauri, J

Appellant Present

Respondent: Absent

B/c: Elizabeth Kayamba

Court: Judgment delivered in court in the presence of the appellant and in absence of the State Attorney this 17/05/2021.

Right of appeal explained.




W. R. MASHAURI

JUDGE

17/05/2021