

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL REVISION NO. 03 OF 2020

***(Arising from Criminal Case No. 62 of 2015 of the District court of Chato
District at Chato Before Hon. E.Kagimbo, RM)***

THE REPUBLIC PROSECUTOR

VERSUS

YUSUPH KALEGEYA ACCUSED

RULING

30/06/2021 & 17/08/2021

W. R. MASHAURI, J;

Formerly, the purported applicant in this application Yusufu Kalegeya was tried and convicted by the District Court of Chato in Criminal Case No. 62 of 2015 for the offence of unnatural offence c/s 154 (I) (a) of the Penal Code and was sentenced to life imprisonment.

Aggrieved with bot conviction and sentence, he appealed to this court vide Criminal Appeal No. 184 of 2016 in which, upon heard the said appeal and upon visited the records of the proceedings, Hon. R. A. Ebrahim the appellate, judge gathered that, the appellant was not availed right to plead

after facts was red to him contrary to the guidance laid down by the Court of Appeal in the case of John Faya V/s Criminal Appeal No. 198 of 2007 and Section 228(I) and (2) of the CPA Cap. 20 R.E. 2002. The Hon. Judge found the omission a fatal procedural irregularity. He invoked the revisional powers conferred to this court under section 373(I) of the CPA and ordered a retrial of the matter before a different magistrate. A trial de-novo of the case was done by Hon. Y. C. Myombo DRM i/c and in his judgment he delivered on 10/03/2021, he found the accused guilty of the offence of unnatural offence C/s 154(I)(a) of the Penal Code.

The learned magistrate did not pronounce sentence nor did he accord the accused his right to make his mitigation. This connotes that the former sentence of life imprisonment was left undisturbed.

Following this decision in a trial denovo, the accused was aggrieved. He lodged his notice of appeal in the High Court Mwanza under section 361(i)(a) of the CPA. The notice was filed in the District Court of Chato.

It is however not known what transpired in respect of the notice of intention to appeal as it is shown that, the same was received and stamped

to have been received twice the first on 21st December, 2018 and the second on 13 March, 2021.

When the trial court record was brought before the Deputy Registrar of the High court Mwanza, and upon discovered the anomaly, he brought the same to the attention of the Hon. Judge i/c with an opinion to take disciplinary action to the concerned court clerk who backdated the dates on the Notice of Intention to appeal.

It appears there was a dialogue on minute sheets between the Hon. Ji/c and the Deputy Registrar on how to contain the anomaly and at the end of the day, the Hon. J/i/c referred the file to the Registry Officer and upon received the file the Registry Officer forwarded the file to the DR under M.5 dated 15/9/2020 as follows: -

"Mh. DR, Naomba kuwasilisha kwako utekelezaji wa M.4 kwa hatua zako Zaidi.

Aidha jalada nimelikabidhi kwa i/c wa Criminal kwa ajili ya Revision

Sgd: RO"

Following a request to the DR by the RO, this revision was opened suo moto in this court.

There is therefore no affidavit nor chamber summons as well as any application for revision which was filed in this court by the purported applicant. The accused.

The issue is whether the application for leave to appeal or to file revision out of time is grantable.

Having carefully gone through the evidence on record I am hastened to answer that issue in the negative.

It is cardinal principle at law that, an application for leave to appeal out of time is grantable where the intended appeal has an overwhelming chances of success.

In this sort of application, the evidence against the accused is cogent.

It is evidenced by the victim (PW2) that on 11/2/2015 at about 02:00 hrs on the night was sodonized by the accused who was sleeping together in one room. It is alleged by the victim that, while sleeping in his bed was followed by the applicant who stripped off the victim's clothes and sodonized him, he felt pains and when he tried to shout, was his month covered by the applicant and when his grandmother (PW1) asked what was going on, the accused quickly answered there was nothing wrong. On the following

morning he did not go to school and he told his grandmother (PW1) that he failed to go to school because he was feeling pains in his anus upon being sodonized by the applicant. And in her testimony, the victim's grandmother Mwajuma Musa testified that, while sleeping in her room, she heard voice in the victim's room where was sleeping with the accused and when she heard voice she asked the accused what was going on and he replied there was nothing. When she (PW1) asked the victim on the following morning why he did not go to school he said was sodonized by the accused. The accused who was at the shamba was arrested and taken to the hamlet chairperson who directed them to go to police station where the victim was given a PF3 and was taken to hospital where the doctor who examined the victim confirmed that the victim was sodonized.

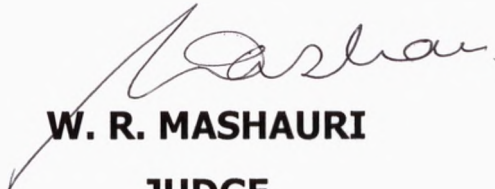
It is currently established principle by the Court of Appeal in the cases of **Seleman Mkumbo V/s R Criminal Appeal No. 94 of 1999** (unreported and **Daffa Mbwana Kedi V/s R. Criminal Appeal No. 65 of 2017 CAT Tanga Registry** (unreported that, the true evidence of Rape which is equal to sodomy has to come from the prosecutrix (victim) himself/herself. A woman where consent is not required and a girl or a boy where consent is

immaterial. The victim in this case is a school boy of 13 years of age. So the allegation of consent if any is immaterial.

Looking from the events, this purported application for leave to file an appeal out of time against the judgment of the District court of Chato is dismissed for want of sufficient reasons to pursue an appeal in the High court out of time.

It is so decided.




W. R. MASHAURI
JUDGE

17/08/2021

Date: 17/08/2021

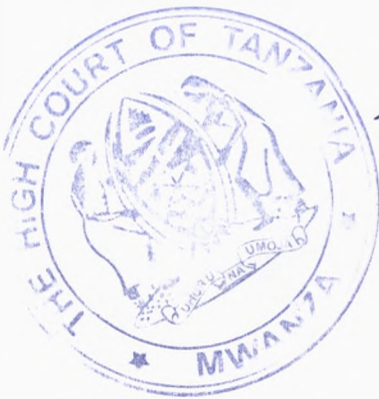
Coram: Hon. W. R. Mashauri, J

Appellant:

Respondent:

B/c: Jackline

Court: Ruling delivered in court in presence of Mr. Hemed Senior State Attorney and the Yusuf Kalegeya this 17/08/2021. Right of appeal explained.




W. R. MASHAURI

JUDGE

17/08/2021