

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 18 OF 2021**

(Originating from Decision of the District Court of Babati at Babati in Criminal Case  
No. 67 of 2020)

**SAID SHABANI..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

05.05.2022 & 17.06.2022

**N.R. MWASEBA, J.**

Before the district court of Babati the appellant, Said Shabani was charged with an unnatural offence contrary to Section 154(1) (a) of the Penal Code, Cap 16 R.E. 2019. After full trial he was convicted and sentenced to life imprisonment. Aggrieved by both conviction and sentence, he lodged the present appeal armed with six (6) grounds of appeal.

His grounds of appeal are focused on the following areas: **First** that the prosecution failed to prove their case beyond a reasonable doubt;

*Mwaseba*

**second** that the trial magistrate failed to analyse and evaluate evidence on record; **third** that the scenario surrounding the case that led to conviction the appellant was not analysed; **fourth** that the prosecution evidence is contradictory; **fifth** that the trial magistrate erred in law for failing to notice that the evidence of PW1, PW2, PW3, PW4 PW5 and PW6 did not corroborate; and the **sixth** one is that the decision of the trial court was unfair hence lacking legal legs to stand.

A brief fact of the case as narrated by the victim reveals that, on 17.03.2020 at 16:00 hours while the victim (PW1) was grazing cattle at *Machakani*, the appellant apprehended him. Thereafter, he undressed the victim and laid him down. He also undressed himself and laid on top of the victim. Then he smeared *mlenda* grass around the victim's anus and started inserting his penis. The act was committed at *Korongoni*. The victim shouted for help then his friends heard and came to the said *Korongoni* and started beating the appellant who later managed to escape but was apprehended by the people who responded to the alarm for help and took him to the police station. The victim was taken back home where, after being informed about the incident, her mother inspected the victim at his buttocks and noticed that his anus was enlarged and had some poo in it. Thereafter, on the same day the victim was taken to the hospital for examination after being availed with

a PF3. It was the doctor's diagnosis that the victim had a serious swelling at his back side of his head. However, he diagnosed that there were no bruises out and in way of anal area. And his anal sphincter was found to be intact without any abnormality. He filled the PF3 as to what he observed, and the same was admitted in court as exhibit.

In his defence the appellant told the court that on the material day the victim and his mother were at the valley grazing their animals. When he was passing thereby the victim called him because he knew him. He started talking to him then the last prosecution witness (PW6) came and asked what he was doing with the child. He started fighting against him then the victim ran away.

The appeal was heard orally, whereby the appellant appeared in person, unrepresented whilst the respondent was represented by **Ms. Eunice Makala**, learned State Attorney.

During my perusal of the record and upon hearing the submissions of both parties, I found that the fourth ground of appeal suffices to dispose of this appeal.

Submitting on the fourth ground of appeal, the appellant complained that, the prosecution evidence was a contradictory one due to the reason that: Firstly, the doctor said in order for a person to be

*Makala*

sodomized bruises must be seen at his anus taking into consideration that the victim was taken to the hospital on the same date, while PW2, PW5 and PW6 say the victim was sodomised. Secondly, the prosecution witnesses contradicted each other regarding the place where the incident occurred. While the victim said the crime was committed at *Korongoni* area (see page 13 of the trial court proceedings), PW5 and PW6 said they found the victim and the appellant at the appellant's hut. Thus, it was his submission that the said contradiction brings doubts as to whether the offence was committed or not.

Regarding this ground, Ms Makala learned State Attorney responded that the victim (PW1) said the appellant found him at *Korongoni* and took him to his hut while PW5 and Pw6 states that they found him in the house, so there was no contradiction in the said evidence and even if there is contradiction it is just a minor one which does not go to the root of the case. So, the 4<sup>th</sup> ground has no merit.

I have gone through the record and submission by both parties and found that there is actually a contradiction with regard to the commission of the offence and also the scene of crime. Regarding the place where the incident happened it was not clear whether it was in the bush, in the *Korongo* or inside the appellant's hut. While PW1 testified

*Aweya*

that the appellant sodomized him at *Machakani* and sometimes *korongoni*, PW5 and PW6 who alleged to witness the incident testified that the victim was sodomized inside the appellant's hut. And to make the matter worse during the Preliminary Hearing, the prosecution alleged that the incident occurred inside the house where the victim was dragged in by the appellant.

Further to that, PW3 who is a doctor who examined the victim told the court that nothing was seen at the victim's anus and the anus was still intact. There were no bruises out and in way of his anal area and no sperms were seen. He tendered a PF3 which was admitted as "Exhibit P1". This is contrary to the evidence PW2 (victim's mother) who inspected the child on the same day after being informed that he was sodomized. She said she saw some poo in his anus and the said anus was enlarged.

Having the above testimony, the issue is whether the inconsistency and contradiction raised by the appellant go to the root of the matter.

I am aware that contradictions can not be avoided at all. And it is not every discrepancy in the prosecution case that will cause the prosecution case to collapse. The same has been expounded in a number of cases

*Handwritten signature*

including the case of **Chrisant John V. The Republic**, Criminal Appeal No 313 of 2015 CAT court held, *inter alia*, that:

*"We wish to state the general view that, contradiction by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions it must always be remembered that witnesses do not make a blow by blow mental recording of the incidents. As such contradictions should not be evaluated without placing them in their proper context in an endeavour to determine their gravity, meaning, whether or not they go to the root of the matter or rather corrode the credibility of a party's case."*

The same was held in the case of **Dickson Elias Nsamba Shapwata & Another V. Republic**, Criminal Appeal No.92 of 2007, the Court of Appeal further held that:

*"In evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."*

It is my considered view that this contradiction goes to the root of the case. This is due to the fact that the contradictions have gone to the

gist of commission of the offence by itself whereby the evidence on record was never supported by expert evidence of a medical doctor via Exhibit PI (PF3) who told the court that the anus of the victim was intact.

In the case of **Michael Haishi Vs. R.** [1992] TLR 92 the court held that, contradictory evidence create doubt, which doubts should be decided in favour of the accused/appellant.

That being the legal position, I am in full concurrence with the submission of the appellant that the prosecution failed to prove the charge against the appellant. Accordingly, I allow this appeal in its entirety by quashing the conviction and setting aside the sentence imposed on the appellant. The appellant is to be released from custody forthwith unless he is otherwise lawfully held.

It is so ordered.

**DATED at ARUSHA** this 17<sup>th</sup> day of June, 2022.



  
**N.R. MWASEBA**

**JUDGE**

**17.06.2022**