

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 59 OF 2021

(C/F DC Criminal Case No. 299 OF 2020 in the District Court of Moshi at Moshi)

LIVINUS KAJUNA KASHASHA APPELLANT

Versus

THE REPUBLIC RESPONDENT

16/5/2022 & 17/6/2022

JUDGMENT

MWENEMPAZI, J.

The appellant was charged in the trial court for committing Unnatural Offence Contrary to Section 154(1) (a) (2) of the Penal Code, Cap. 16 R.E. 2002 as amended by Section 185 of the Law of the Child Act, 2009. It was alleged that Livunus Kajuna Kashasha on the 7th day of July, 2020 at Shirimatunda area within the District of Moshi in Kilimanjaro Region, did have carnal knowledge of one Joyce d/o Juma @James a girl of 13 years old against the order of nature.

When the charge was read over to him the accused denied and the case had to go for full trial. The prosecution called six (6) witnesses and the defence called two witnesses. At the end the accused was found guilty, convicted and sentenced to serve a term of thirty years imprisonment. The



appellant being aggrieved has filed this appeal, raising ten (10) grounds of appeal.

At the hearing the appellant appeared in person and the respondent was being served by Ms. Grace Kabu, State Attorney. The appellant prayed to submit his appeal in writing. Leave was granted as the respondent had no objection to the prayer.

The Respondents is supporting the appeal basing on the grounds number 1,5 and 10, which grounds reads as follows:

1. That the honorable trial court magistrate grossly erred in both law and fact by convicting the appellant with the offence which was not proved beyond all reasonable doubt.
5. That, the Honourable trial magistrate grossly erred in both law and fact when she meted a conviction to the appellant relying and being impressed by the evidence of the prosecution which was weak, contradictory, incredible evidence and above all the court did not warn itself against reliance on such evidence.
10. That, the honourable trial magistrate grossly erred in law and fact by being adamant that the appellant's strong and full supported defence did not cast any reasonable doubt in the prosecution case.

In the submission by the appellant, he has submitted extensively in respect of the 1st ground of appeal that the prosecution failed to prove the case beyond reasonable. According to the appellant, he submitted that as per

Section 110 (2) of the Evidence Act, Cap. 6 R.E. 2009 that is the duty of the prosecution.

In further clarification the appellant has referred to the evidence of PW1 and PW2 (victim) that the victim failed to disclose to any person that it was the appellant who had carnal knowledge with the victim. In this case the victim took time, a number of days, to disclose the fact which raises doubt and renders her evidence to lack any credibility. The appellant has cited the case of **JARIBU ABDALLAH V. REPUBLIC**, Criminal Appeal No. 220 of 1994 Court of Appeal of Tanzania at Dar es Salaam where it was held that:

"The ability of the witness to name the suspect at the earliest possible opportunity is an all assurance of his reliability, in the same way unexplained delay or failure to do so should put a prudent court to inquiry."

In this case PW1 testified to have discovered for the first time, on 29/6/2020, that the victim had carnal knowledge against the order of nature. That remained so and treatments started, until on 7/7/2020 when the victim was interrogated by the said PW1 whereby she said to have been advised by the accused to escape from her aunt's home on promise of employing her. According to the evidence by PW1 when she escaped that is when she has sex against the order of nature with the accused. That is according to the interrogation conducted by the said PW1 on 8/7/2020 at Mama Doreen's residence where it is testified by the appellant.



According to the testimony of PW2, the victim, the accused had sex against the order of nature with her for more than four times. He was the one who kept calling the victim at his residence home in two instances and she had sex with the accused two times at her aunt's home. At one time her (victim's) uncle was present. On the date the appellant pretended to ask for drinking water from the victim then he advised her to escape on promise he will employ her for Tshs. 83,000/= per month salary.

It is also in the evidence of PW1 that the police officer is the one who informed them that the person who took the victim to mama Doreen is the one who sodomized her. I believe the referred police officer is PW4 Swalehe Awadhi Kingazi.

The evidence PW4 Swalehe Awadhi Kingazi denied to know the fact except after he had been told by the victim, who he calls the lady, whereas in the proceedings we are told the victim is a child of 13 years old.

In the submission by the State Attorney for the respondent, she has generally submitted that it is a cardinal principle of law that the best evidence on sexual offences come from the victim as per **Seleman Makumba vs Republic [2006] TLR 380**. In this case PW2, the victim is the only key witness but her evidence has contradictions which go to the root of the case.

The counsel for the respondent has taken trouble to refer on a number of contradictions apparent in the evidence by the prosecution which are



detrimental to the case by the prosecution against the appellant. Below is a brief review of the evidence and the contradictions.

At page 11 of the typed proceedings, paragraph two the trial court's record PW2 testified that after being sodomized by the appellant she started suffering on her anus, whereas her aunt was informed and took her to hospital where she was given some medication and started recovering.

But at page 14 of the same proceedings, PW3, Anastazia Abdul testified that on diverse dates on July, 2020 when PW2 was taking shower, she called PW3 and told her that she is bleedings on her vagina. She asked PW2 what is wrong, PW2 told her that she is suffering from fungus.

Again, at page 11 paragraph 4, PW2 (the victim) testified that on the third day when the appellant went to the victim's house, the appellant inserted his male organ into her vagina.

But PW6, Dr. Edna Rangia Mushi, at page 24 paragraph 2, who examined the victim on her anus and vagina, testified that PW2's vagina hymen was intact.

This Contradictions raise a serious doubt that if the appellant used to sodomize the victim (PW2) more that once and cause her sphincter muscles to lose then why PW2's vagina hymen was still intact after the appellant had inserted his male organ into her vagina.

Also, at page No. 12 of the trial Court's typed proceeding, PW2(the victim) testified that "... after a few minutes' mama Doreen was called by a police

officer who informed them that the one who brought me there was the one who did something bad to me."

But at page 15 last paragraph of the same proceedings, PW4, SWALEHE AWADHI KINGAZI (auxiliary police) testified that, *"...after getting there I found 2 women with one lady know as JOYCE JUMA. I asked them their problem. They replied that our girl has been raped."*

Apart from the contradictions seen in the victim evidence there are other contradictions to other prosecution witnesses which are:

Contradiction between the testimony of PW3 ANASTAZIA ABDUL and the testimony of PW1, NASMA HAMIS MFINANGA.

At page 7, paragraph 5 PW1, testified that while continuing with her business she was called again by PW3 who told her that while taking shower PW2 she found dirty fluid(pus) coming from anus.

But PW3 at page 14 testified that when PW2 was taking shower, she called PW3 and told her that she is bleeding on her vagina contrary to what testified by PW1 that PW3 found dirty fluid(pus) coming from anus.

Also, PW1 told the court it was on 29/6/2020 but PW3 told the court it was on diverse dates on July 2020 although they testified before the court two months later that is PW1 on 2/9/2020 and PW3 on 23/9/2020 which is not a long period of time.



The counsel submitted on ground 5 that the appellant is also faulting the trial magistrate when she meted a conviction to the appellant relying on incredible, unreliable and uncorroborated evidence.

At page 7 paragraph 6 of the trial court's proceedings, PW1 testified that on 31/6/2020 she took PW2 to Shirimatunda health center, the doctor examined PW2 and told her that PW2 had sexual intercourse against the order of nature and she has infection.

But this witness (PW1) kept silence about the matter without reporting to the police for about a week until on 7/7/2020 when PW2 escaped from her house.

On ground 10 the appellant is also faulting the trial magistrate be being adamant that the appellant's strong and full supported defence did not cast any reasonable doubts in the prosecution case.

At page 27 of the trial proceedings the appellant defended himself that on 7/7/2020 at 19:30 hours, he found PW2 at his gate asking for help because her aunt abuses her daily.

At page 18 of the same proceedings, PW5 KARISMA PETER MSELE testified that on 7/7/2020 at 8 PM the appellant came to her house and explained to her that there is a child who came to his house seeking for help.

At page 18 and 19 of the same proceedings, it is clearly that the appellant and PW5 agreed to call the victim's aunt who was not around but instead the victim's uncle (the husband of the victim's aunt) went to the PW5's

house where they both agreed that the victim should be taken to Doreen's house.

However, the victim's uncle and a person referred as DOREEN were not called to testify to tell the court why the victim has to sleep at DOREEN'S house instead of going back to her aunt's house if the aunt was not abusing her as alleged by the appellant.

The counsel for the respondent prayed that the contradictions are serious between the evidence of the victim PW2 who is the only key witness in this case and other prosecution witnesses whom their evidence would connect the appellant to the offence committed. They are therefore supporting the appeal on the basis of the grounds raised by the appellant.

Upon reading the record and demonstration shown by the council for the Respondent, I am satisfied that there are a lot of contradictions as pointed out. According to the case of **Mohamed Said Matula vs Republic [1995] TLR 3 CA** it is the duty of this court to decide as to whether they go to the root of the case.

Without any doubt, I am satisfied that the contradictions are so material and touch the root of the case. In the cited case herein above, it was held that:

"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the

inconsistencies and contradictions are only minor or whether they go to the root of the matter."

As said herein above, I have no way to explain away the contradictions; the demonstrations by the respondent are plain clear. There is no way one work on the inconsistencies and come up with a clear case with no doubt as to the allegations raised against the appellant. The case has to collapse by resolving the doubts raised in favour of the appellant.

Therefore, the appeal is allowed, the judgment and conviction are quashed, sentence set aside and the accused/appellant should immediately be released from prison unless he is otherwise lawfully held.

It is ordered accordingly.

Dated and delivered at Moshi this 17th day of June, 2022



A handwritten signature in blue ink, appearing to read "T. M. Mwenempazi".

T. M. MWENEMPAZI
JUDGE

Judgment delivered in court in the presence of the appellant and Ms. Mary Lucas, learned State Attorney for the Respondent.

A handwritten signature in blue ink, appearing to read "T. M. Mwenempazi".

T. M. MWENEMPAZI
JUDGE