

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO.134 OF 2021

(Appeal from the decision of the District Court of Bagamoyo at Bagamoyo dated 5th October, 2020 Hon. M.F. Sabuni, SRM in Criminal Case No. 01 of 2019)

HASSAN HAMIS IDDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 29/09/2022

Date of Judgment: 6/10/2022

POMO,J

The Appellant was arraigned before Bagamoyo District Court (the trial court) charged with one count of unnatural offence contrary to section 154(1)(a) of the Penal Code [CAP 16 R.E.2002]. It was the particulars of



the charge that, on 29th day of December, 2018 at about 2:00hrs at Kitame village within Bagamoyo District in Coastal region, did have canal knowledge against the order of nature of one Rashid S/O Omary a child of 5 years old, the charge which was denied by the Appellant.

In proving the charge against the appellant, the respondent republic brought seven witnesses to testify (see pp.7 – 24 of the typed proceedings) while for defence side two witnesses testified. The trial court was satisfied with prosecution evidence to have proved the charge beyond reasonable doubt henceforth he was convicted and sentenced to serve thirty years jail sentence.

Aggrieved with the decision of the trial court, the appellant has appealed to this court with nine (9) grounds of appeal lodged on 8th December, 2020 and with leave of the court dated 27/09/2022, additional grounds of appeal which are four in number

Hearing of the appeal was on 28/9/2022 whereby the appellant appeared in person unrepresented while the respondent republic was represented by Emmanuel Maleko, senior state attorney.



The Appellant allowed the Respondent republic to begin arguing the appeal while reserving his right to rejoin

In arguing the appeal, the learned senior state attorney, began by submitting that he supports the appeal

Advancing his argument on the first ground of appeal, Mr. Maleko submitted that the cautioned statement was taken out of statutory time contrary to **section 50 & 52 of the Criminal Procedure Act, [Cap 20 R.E.2019] (the CPA)**. That, while the incidence of the crime occurred on 29/12/2018 the cautioned statement Exhibit P.1 tendered by PW6 No.3325 D/CPL Aman recorded it on 31/12/2018. Referred this court to page 18 of the typed proceedings. It was his submission that under section 50(1)(a) of the CPA cautioned statement has to be taken within four hours from the time the accused is arrested. Contrary to section 51 of the CPA, no reason stand testified as to why the cautioned statement Exhibit P.1 was taken beyond four hours of arrest.

As to ground No.2 of appeal, the learned senior state attorney argued that the victim **PW4 Rashid Omary** is of tender age (see pp.11 – 12 of the typed proceedings). He was 5 years old. He testified in violation



of **section 127(6) of the Evidence Act, [Cap 6 R.E.2019]** because the record is silence on whether he gave promise to tell the truth and not lies, thus his evidence is not credible. He didn't mention the date when the incident occurred. This ground of appeal has merit, the learned state attorney concluded.

As to recognition of the appellant, it was Mr. Maleko submission that it is on record that the incident took place at night hours but there is no any witness who testified that the appellant was identified during the commission of that crime. The victim himself does not explain whether the scene of crime had enough light, be of moonlight or electric bulb/ tube light. In other words, the source of light was not disclosed. That is not enough, the description of the appellant is not disclosed, what he wore on that time of incident, is he tall or short, his colour, all these are not described. PW1 described the appellant as baba Hamis, that alone cannot be taken to be enough identification of the accused/appellant. Even if the witness is familiar with the accused, there must be sufficient descriptions of the accused/appellant, which was not the case here. The identification relied upon raises doubt as the possibilities of existence of mistaken identity of the Appellant as a person who committed the offence were not

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eliminated as was so held in the case of **Waziri Amani v. Republic**
[1980] TLR 250

On ground No. 3 of appeal regarding failure to consider the appellant's defence evidence which he asserts to have more weight compared to that of prosecution. The learned senior state attorney submitted subscribed to the ground. According to him, the evidence of the appellant was not considered but if compared with that of the prosecution his evidence is stronger than the prosecution evidence which is only exhibit P.1 evidence of PW4 which is weak evidence.

Mr. Maleko, concluded his submission by arguing that suffice to say the appeal has merit. The evidence of the PW4 the victim cannot be taken to be the best evidence worth supporting the conviction of the appellant on the offence charged. The evidence in totality is not water tight. No date of the incident, lack of description of the vital element for recognition. The corroboration evidence brought cannot stand the test in supporting the conviction. He concluded by praying to the court to allow the appeal.

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When the Appellant was asked to respond, being a lay person, had nothing usefully to contribute. He prayed to the court his appeal be allowed.

Having heard the submissions by the learned senior state attorney, dispassionately this court has visited the trial court records and noted that what is submitted by the learned senior state attorney is a true reflection on the trial court records. The date as to when the commission of crime occurred is not disclosed by any witness. The offence being that of unnatural offence, it was crucial for the date to be disclosed or else adducing evidence relating as to why the date could not be disclosed. Such evidence is missing. The Court of appeal in **Jaffary Ntabita @ Nkolanigwa vs R, Criminal Appeal No.270 of 2016 CAT at Tabora (unreported)** at pp. 8 – 9 had this to state: -

*"It is important for the republic to lead evidence showing **exactly the date the victim was raped.** The rationale is that when a specific date of the commission of the offence is mentioned in the charge sheet, the defence case is prepared and built on the bases of that specific date. In Anania Turian (supra) the Court making reference*

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to Christopher Maingu Vs Republic, Criminal Appeal No. 222 of 2004 (unreported) stated thus:

*"If there is variation in the dates then the charge must be amended forthwith and the accused explained of his right to require the witnesses who have testified be recalled. **If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right, short of that, a failure of justice will occur.**"*

Again, as pointed out, the offence the appellant was charged is alleged to have been committed during night time and the evidence adduced is that of visual identification of the Appellant. The shortfall to the evidence adduced stand as pointed out by the learned senior state attorney, that no description to the identity of the accused is offered by the prosecution witnesses, intensity of light, what he was wearing, to mention but a few. Under the circumstances, mistaken identity cannot be overruled to exist. In the often cited case of **Waziri Amani v. Republic [1980]** TLR 250, at pp. 251 - 252, the Court of Appeal observed:



*"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that **no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.**"*

It is on the basis of what is alluded above, this court finds that it was wrong for the trial court to convict the appellant on the charge which was not proved beyond reasonable doubt. As pointed out by the learned senior state attorney, doubts are many and have to be resolved in favour of the appellant.

That said, the appeal is hereby allowed. The trial court judgment and sentence meted to the Appellant are hereby quashed and set aside.

In the event, this court orders the Appellant be released from custody forthwith unless is otherwise lawfully held.

It is so ordered

Right of Appeal explained



Dated at Dar es Salaam this 6th day of October, 2022



A handwritten signature in blue ink, appearing to be "M.K.P.", positioned above the printed name.

Musa K. Pomo

Judge

This Judgment is delivered on this 6th October, 2022 in presence of the Appellant and Emmanuel Maleko, the learned Senior State Attorney, for the Respondent.

A handwritten signature in blue ink, appearing to be "M.K.P.", positioned above the printed name.

Musa K. Pomo

Judge



6/10/2022