

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 87 OF 2021

OCTAVIAN KAIJAGE @ OKI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Shinyanga at Shinyanga]

(Hon. U.S. SWALLO PRM)

dated the 5th day of October, 2021
in
Criminal Case No. 91 of 2020

JUDGMENT

17th & 28th October, 2022.

S.M. KULITA, J.

This is an appeal from Shinyanga District Court. The appellant herein above was charged for “Unnatural offence” contrary to the provisions of section 154(1) and (2) of the Penal Code [Cap 16 RE 2002].

Particulars of the offence as provided in the charge are to the effect that on 23rd November, 2020 at Majengo Kambarage area within

Shinyanga Municipality in Shinyanga Region, the appellant did have carnal knowledge of a boy aged 11 years against the order of nature.

The facts presented by the prosecution that gave rise to the trial of the appellant in a nut shell are as follows; the victim's uncle was informed by the victim's mother that she got an information that the victim has been normally seen with the appellant. Following that information, the uncle decided to interrogate the victim who lastly decided to disclose the ordeal that, he was having sex with the appellant against the order of nature. The victim added that, he was threatened to be killed if he dared to tell anybody. Eventually, the uncle reported the matter to the Police Station, consequently, the appellant was arrested. When the investigation was complete, the appellant was arraigned before the court to face his charge.

On his part the appellant denied to have committed the offence. To the conclusion of the trial, the appellant was accordingly found guilty, and upon conviction, he was sentenced to serve the imprisonment of thirty years. That was on 5th of August, 2021.

Aggrieved with that decision, the Appellant preferred the instant appeal on seven grounds which may be summarized as follows; **One**, the trial court failed to consider that there was no strict proof that the

appellant is the one who sodomized the victim. **Two**, the trial court erred to convict the appellant while the date of commission of offence found in the charge sheet was not proved. **Three**, it was wrong for the trial court to convict the appellant while the evidence of the Medical Doctor did not corroborate the victim's evidence. **Four**, the trial court wrongly relied on the contradictory evidence of PW1 and PW3. **Five**, the trial court erred in relying on the evidence of the victim (PW2), PW1 and PW4 while the same needed corroboration. **Six**, the defense evidence was not considered while it was corroborated with the prosecution witnesses.

On 10th of August, 2022, the appeal was scheduled for hearing through written submissions. On it, the Appellant got representation of Mr. Geoffrey Tuli, Advocate whereas the Respondent, Republic had the service of Ms. Gloria Ndoni, learned State Attorney who resisted the appeal.

With regard to the second ground of appeal, Mr. Tuli submitted that, the 23rd November, 2019 being the date specified at the charge sheet as the date of commission of the offence, was not proved by the prosecution. He amplified that, the prosecution ended stating that, the offence was committed ten times in a period ranging between July and November, 2019. With that observation, Mr. Tuli formed an opinion that, the

prosecution case was not proved to the required standard. He cited the case of **Ibrahim Sharifu v. The Republic, Criminal Appeal No. 175 of 2018** (unreported) to support his allegation.

In the thereto the respondent's counsel, Ms. Ndoni, State Attorney made reference to the testimony of PW2, the victim. She stated that, the time range provided by the witness (victim) includes the 23rd November, 2019. However, she admitted that, there was no prosecution witness who specifically mentioned the 23rd November, 2019 but she quickly pointed out that, it was so because the victim is a minor and the act took place several months ago before it had been noticed and reported at the Police Station. She insisted that, the variance between the date adduced in the charge sheet and the evidence of PW2 is immaterial. To support her argument, she cited the case of **Nkanga Daudi Nkanga v. Republic, Criminal Appeal No. 316 of 2013 CAT Mwanza**.

In rejoinder Mr. Tuli was of views that, as long as the specific date was mentioned in the charge sheet being the date for commission of the offence, to him, the prosecution are specifically bound to prove it. Failure of which, according to Mr. Tuli, renders the prosecution case to have not been proved at the required standard.

From the foregone submissions by both parties in respect of the 2nd ground of appeal, it is not in dispute that, there is variance on the date of commission of the offence as between that mentioned in the charge sheet and that mentioned by the only prosecution witness, PW1. It is further not in dispute that, under section 234 (1) of the Criminal Procedure Act, the prosecution had a chance to amend the charge but they did not amend it up to the conclusion of the case. The said provision states; -

"Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just"

In Abel Masikiti v. Republic, Criminal Appeal No. 24 of 2015

the Court of Appeal observed as follows;

*"If there is any **variance or uncertainty** in the dates then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal." (**emphasis is mine**)*

Being guided by the excerpt from the above decision, and as I have amply demonstrated, certainly, the variance on dates suffices to dispose of the appeal, but I consider it important to highlight another variance before I conclude.

The charge sheet shows that, the victim was sodomized only once, the incidence that took place on 23rd November, 2019 meanwhile the testimony of the prosecution eye witness, PW2 (victim) transpires that, the offence has been committed 10 times between July and November, 2019. This too depicts variance between the charge sheet and the testimony. In this situation I find that, the prosecution evidence is not compatible with the particulars pointed out in the charge sheet to prove the charge at the required standard. See, **Issa Mwanjiku @ White v. Republic, Criminal Appeal No. 175 of 2018, CAT at DSM.**

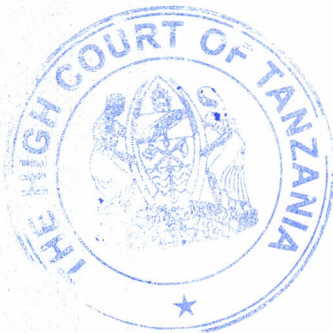
On account of the above, I am well settled in my mind that, the prosecution case was not proved at the required standard. In the event,

I find this ground sufficient to dispose of the appeal. I therefore allow the same. The conviction is hereby quashed, and the sentence set aside. Unless, he is held for any other lawful cause, I order the immediate release of the appellant from prison.



S.M. KULITA
JUDGE
28/10/2022

DATED at SHINYANGA this 28th day of October, 2022.



S.M. KULITA
JUDGE
28/10/2022

