

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DAR ES SALAAM
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 31 OF 2020

MAHAMUDU THABIT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Temeke at Temeke.]

(Hon. Madili RM)

dated the 23rd day of December, 2019

in

Criminal Case No. 994 of 2019

JUDGMENT

12th August, 2021 & 5th May, 2022.

S.M KULITA, J.

Mahamudu Thabit @ Mtarika @ Kendrick, hereinafter referred to as the Appellant, was charged in the District Court of Temeke for Unnatural Offence, contrary to the provisions of section 154 (1)(a) of the Penal Code [Cap. 16 RE 2002]. It is in the particulars of offence that, on the 31st day of October, 2018 at Mbande area within the District of Temeke in Dar es

Salaam, the Appellant had carnal knowledge of the victim (PW1), against the order of nature.

The case of the prosecution as unfolded by the evidence of PW1 is that, on the fateful day, that is 31st October, 2018, PW1, a girl of 19 years was sent to the shop. On the way, she met with the Appellant together with his friends who were carrying "panga". She said that, she was then forced by those persons to follow the direction where she was ordered to go. The journey ended at the house where they entered the room. In it, the Appellant tuned high the volume of the radio and proceeded to undress the victim. She went on stating that, after being undressed, the Appellant tried to insert his penis into her vaginal but failed. He decided to insert it into the victim's anus.

PW1 narrated further that, after the act, sodomy, she was released. She then left the place while crying. At their home, she reported the matter to PW2, her aunt "mama mdogo" who took her to the police station where they were given a PF3 (Medical Examination Form). PW4, the Doctor who examined the victim concluded that the victim was sodomized.

The Appellant denied to have committed the offence. However, he agreed to have met with the victim on the material date following the

victim's demand. He added that, they are lovers who normally have romance secretly. This fact was also testified by the other defense witnesses during trial at the District court. The Appellant's view was that, this is a fabricated case as the victim's aunt (PW2) does not like the love relationship he has with the victim.

At the end the Appellant was accordingly found guilty, and upon conviction, he was sentenced to 30 (thirty) years imprisonment. That was 23rd day of December, 2019.

Aggrieved with that decision, the Appellant preferred the instant appeal relying on ten grounds which may be summarized as follows: **One**, it was wrong to convict him on a defective charge sheet, **two**, the prosecution case was not proved at the required standard, **three**, the trial court did not adhere section 231(1) of the Criminal Procedure Act, **four**, there was a failure to deliver the judgment as per the requirements of section 312(1) of the Criminal Procedure Act, **five**, it was wrong to base conviction on exhibit P1 that followed no chain of custody, **six**, the trial court did not comply with section 212 of the Criminal Procedure Act, **seven**, the trial court failed to evaluate evidence before convicting him, **eight**, his conviction based on the opinion of unqualified person (PW4), **nine**, the trial court failed by not assessing credibility of witnesses, **ten**,

the trial Magistrate violated section 214(1)(2)(3) of the Criminal Procedure Act.

The Appeal was determined through written submissions. Both parties complied with the scheduling orders. Mr. Adrian Mhina, Advocate represented the Appellant whereas the Respondent (Republic) was represented by Ms. Monica Ndakidemu, State Attorney.

As alluded earlier, among the things that the Appellant complain of in his appeal, include the fact that the prosecution has failed to prove its case beyond all reasonable doubts and that, the trial Magistrate failed to evaluate the available evidence in records. To him this means that had the trial Magistrate properly directed himself in evaluation of the evidence, he would have not ended to the conviction.

I have carefully passed through the trial court's judgment. At page 6 of it I have found the following as I hereunder quote; -

"Coming to the second issue whether accused person is the one committed the said offence. According to the evidence adduced by PW1 testified that, evidence by PW1 shows DW1 and his fellows dragged the victim to PW1's home while they were carrying Pangas, and

sometimes back DW1 approached the victim so they could be lovers but PW1 refused, DW1 and DW2 testified these two were lovers and on material date they both went to DW1's home, according to this evidence the court leaves doubt that the victim and accused were good lovers and thus know each other well, even on material date they planned meeting, because evidence shows it was not possible for the victim to be threatened with two men carrying pangas and no other person could notice, facts shows a place from where she was detained to DW1 home is a long distance that she had to take a "bodaboda" motor bicycle back. Also, the court believes this parties were close lovers. DW1 said, PW1 told him she was a virgin which was verified to be true by the Doctor (PW4)"

The above quoted passage shows that, the trial Magistrate has correctly found out that the victim who testified in court as PW1 lied on several aspects as follows; **first**, the court found out that, the victim was not forced through panga to go to the Appellant's house on the material date, **secondly**, the court found out that, it was the victim who planned

meeting with the Appellant at his house on the material date and time, **thirdly**, the court found out that, the victim and the Appellant know each other, **lastly**, the court found out that, the Appellant and the victim (PW1) are close lovers.

The question is, why has the victim lied this much in her testimony? With the availability of these lies, was it safe for the trial court to hold her as a reliable witness and believe her on some other aspects she testified?

In the case of **BALAKA SINGH v. STATE OF PUNJAB AIR 1975 SC 1962** it was stated that; -

"In order to do substantive justice in a case, the court attempts to separate the grain from the chaff; truth from falsehood". Where this is not feasible because the grain and the chaff are inextricably mixed up, the only available course is to reject or discard the evidence in its totality."

But, in the case of **MT. 38350 PTE LEDMAN MAREGESI V. R., Criminal Appeal No. 93 of 1998, CAT** (unreported) the Court said: -

"We think that, where a witness is shown to have positively told a lie on a material point in the case, his

evidence ought to be approached with great caution, and generally the court should not act on the evidence of such a witness unless it is supported by some other evidence.”

The above holding was then followed by the Court of Appeal in **ABDALLA MUSA MOLLEL @ BANJOO V. THE DPP, Criminal Appeal No. 31 of 2008, CAT at Arusha** and **ANNES ALLEN V. R., Criminal Appeal No. 173 of 2007, CAT at Arusha** (both unreported).

The issue is, with the dictates of the above quoted cases, are there other evidences supporting the victim’s evidence that can warrant this court to believe the victim (PW1) on the remaining part of her testimony? To me the answer is not. This is because, the PF3 that was admitted as Exh. P1 and the testimony of the Doctor (PW4) do not absolutely suggest that the blunt object that has slightly penetrated the victim’s anus was a human male organ.

With the available evidence from the defense that, the victim’s aunt (PW2) did not like the love relationship she had with the Appellant, it follows that, the victim who lied not to have planned the meeting with the Appellant on the material date, could also use any blunt object to insert it on her anus to fulfil their planned bad mission against the Appellant. As

such, I find it safe to disregard the whole of the victim's testimony as per the cited case of **MT. 38350 PTE LEDMAN MAREGESI** (supra).

As long as the victim testified at the trial court as the only eye witness, if the whole of her testimony is disregarded, there remains hearsay evidence which cannot be the base for the Appellant's conviction. On that note, I must agree with the Appellant that, the prosecution have failed to prove their case at the required standard.

In the event, I find that the conviction of the Appellant is unsafe. This ground is sufficient to dispose of the appeal, hence, I allow it. The conviction is hereby quashed, and the sentence set aside. Unless, he is held for some other lawful cause, I hereby order the immediate release of the Appellant from prison.



S.M. KULITA
JUDGE
05/05/2022

DATED at **DAR ES SALAAM** this 5th day of May, 2022.



S. M KULITA

JUDGE
05/05/2022

