IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO.43 OF 2021

(Originating from Criminal Case No. 162 of 2019 of the District Court of Mwanga at Mwanga.)

JOSEPH HENRY..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

13/12/2021 & 17/02/2022

SIMFUKWE, J.

The Appellant herein was arraigned and charged before the District of Mwanga with unnatural offence contrary to **section 154 (1) (a) of the Penal Code, Cap 16 R.E 2002 (now R.E 2019).** The particulars of the offence were that on 10th day of October, 2019 at about 13:00 hrs at Handeni Banda village, within Mwanga District in Kilimanjaro Region, the appellant did have carnal knowledge of one N d/o E a child of 08 years old against the order of nature. The appellant was found guilty of the offence charged, being a habitual offender after being convicted in another case for rape (Criminal Case No. 163/2019), and having regard to the age of the victim, the appellant was sentenced to life imprisonment.

Before the trial court the prosecution managed to call 5 witnesses to prove the charges against the accused person. The proceedings were conducted in camera.

PW3 (the victim) testified before the trial court among other things that on the fateful date she was playing at Flora's house when Joseph the appellant herein called her at his house. He sent her to go to buy for him a mango. That, when she took the mango to the appellant, the victim was taken inside the house of the appellant by the appellant who locked the door and told her to take off her clothes. The victim took off her pant. The appellant ordered her to bend, then the appellant took off his trouser and put some oil and powder on PW3's buttocks before inserting his 'dudu' in PW3's buttocks. The victim was warned not to tell her grandmother before she left from the house of the appellant.

PW3's testimony was corroborated by PW1 the grandmother of the victim who testified to the effect that she was informed by PW2 Angelina that PW3 and her young sister Flora used to be raped by Joseph the appellant. PW1 interrogated the victim who narrated the ordeal to her. Then, PW1 reported the incidence to the village office, then to the police where they were given a PF3 and went to Kagongo hospital. The victim was examined and proved to have been carnally known against the order of nature. PW4 the investigator of the case also stated how she interrogated the suspect, victim and other witnesses who narrated to her what had happened. That, the doctor at Kagongo Health Centre told PW4 that PW3 was carnally known against the order of nature. PW5 the Doctor who examined the victim also testified before the trial court to the effect that when he examined the victim, her anus was found open which is not normal showing that something blunt had penetrated her.

In his sworn defence before the trial court, the appellant denied to know the victim. He said on the date alleged that he committed the offence, he was already at Mwanga police Station, thus he could not commit the offence charged. He added that, the offence was planted against him due to the fact that he had grudges with the parents of the victim.

In its findings, the trial court found the testimony of the victim trustworthy and that the same was corroborated by the testimonies of PW1 and PW2. Then the case against the appellant was found to have been proved beyond reasonable doubts, hence he was convicted of unnatural offence as charged.

In his appeal before this Court the appellant has preferred ten grounds of appeal:

1. *That, trial Magistrate erred in law and fact to convicts (sic) and to sentence the appellant on relying to the contradictory evidence adduced by prosecution side.*
2. *That, trial Magistrate erred in law and fact to convict and sentence the appellant without put consideration (sic) to the qualification of an expat (sic) doctor.*
3. *That, trial Magistrate erred in law and facts to convict and to sentence the appellant on relying to the unreliable evidence adduced by a victim.*
4. *Trial Magistrate erred in law and facts to convict to sentence (sic) the appellant on relying to the contradictory evidence adduced by PW2.*
5. *Trial Magistrate erred in law and facts for failure to consider the evidence adduce (sic) by a defence side.*

6. *That, Trial Magistrate erred in law and facts to convict and sentence the appellant while the change (sic) are not properly framed.*
7. *That, trial Magistrate convict and sentence (sic) the appellant without put (sic) consideration on the duration of medical examination of the victim from the date which (sic) offence was committed.*
8. *That, trial Magistrate erred in law and facts to convict and sentence the appellant while prosecution side fail to prove their case beyond reasonable doubts.*
9. *That, trial Magistrate erred in law for convicting and sentencing the appellant on relying in (sic) the case of* ***ATHUMANI RASHIDI VS REPUBLIC, CRIM APP NO 264 OF 2016 CA TANGA*** *that the best evidence of sexual offence has to come from the victim.*
10. *That, trial Magistrate erred in law to convict and sentence the appellant while prosecution living (sic) a lot of doubts in establishing their case.*

The appeal was argued by way of written submissions. The appellant was unrepresented, while Ms Lilian Kowero learned State Attorney appeared for the Respondent Republic.

On the first ground of appeal, the appellant submitted that it is clear that the trial Magistrate convicted and sentenced the appellant relying on the contradictory evidence adduced by the prosecution side on the ground that the Preliminary hearing show that the offence was committed on 11/10/2019 while PW2 testified that she discovered that the offence was committed on 10/10/2019 when she met her young sister Flora who had Tsh 1000 alleged to have been given by the appellant after being raped together with their friend N (victim herein)

who was given a mango after being raped. The appellant commented that, the contradiction prove that the case was fabricated against him.

Supporting the second ground of appeal, the appellant submitted that the qualification of the doctor is doubtful since in Criminal Case No. 163/2019 the said doctor stated that he was the in charge of Kagongo Health Centre; while in this matter the said doctor testified as Assistant Medical Officer of Kagongo Health Centre. The appellant submitted further that there was no introductory letter of the said Doctor and that signing a PF3 was not conclusive evidence that he was an expert without any supporting document. He attached judgment of Criminal Case No. 163/2019 and craved leave of this Court to form part of his submissions.

In respect of the third ground, the appellant submitted to the effect that the trial Magistrate erred in law and facts to convict the appellant on the ground that the victim testified that on the material date when the appellant had carnal knowledge of her against the order of nature she was in the company of Flora, while the said Flora alleged that she was alone.

On the fourth ground of appeal, the appellant submitted inter alia that, PW2 adduced contradictory evidence in respect of the date when the offence was committed. That, in Criminal Case No 162/2019 the said witness alleged that the victim was carnally known against the order of nature on 10/10/2019, while in Criminal Case No. 163/2019, the same witness alleged that the incidence occurred on 09/10/2019.

On the fifth ground of appeal, the appellant faulted the trial Magistrate for failure to consider his defence that he had grudges with the family of the victim who had promised to fabricate a case against him.

On the sixth ground of appeal, the appellant submitted that since the offences in **Criminal Case No. 162/2019** and **Criminal Case No. 163/2019** were alleged to have been committed on the same date, time and place, the same should have been framed as one charge sheet different counts; pursuant to **section 133 of the Criminal Procedure Act, Cap 20 R.E 2019.**

Regarding the seventh, eighth and tenth grounds of appeal, it was submitted that the trial Court failed to consider the duration from the date of commission of offence to the date when the victim was examined, which is bad in law. Thus, from 10/10/2019 to 13/10/2019.

In respect of the nineth ground of appeal, the appellant referred to the case of **Hamis Halfan Dauda Versus Republic, Criminal Appeal No. 231 of 2009, Court of Appeal at Dar es Salaam** (unreported) in which it was stated that evidence of the victim should not be accepted and believed wholesale. Thus, the trial Magistrate misdirected herself on relying on the case of **Athumani Rashidi Versus Republic, Criminal Appeal No. 264 of 2016, and Court of Appeal at Tanga**, where it was held that true evidence in sexual offences has to come from the victim.

Opposing the appeal in her written submissions, Ms Kowero learned State Attorney supported the conviction, sentence and orders meted due to the strength of prosecution case. The learned State Attorney argued the 1, 2, 3, 4, 5, 7, 8, 9 and 10 grounds of appeal together as

the same concern matters of evidence and ground No. 6 was argued separately as the same concerns matters of law.

Commencing with the 6th ground of appeal in which the appellant claimed that the charge sheet was not properly framed, Ms Kowero submitted that the ground does not hold water as the charge sheet was properly framed, with the name of the victim, age of the victim, the name of perpetrator and the place where the offence was committed. That, it has the statement of the offence and the particulars of the offence as required by **section 132 and 135 (a) (ii) of the CPA.** The learned State Attorney admitted that the said charge sheet has no sentencing subsection, that is **section 131 (3) and section 131 (1) of the Penal Code;** which does not render the charge sheet defective. She added that there was no prejudice to the appellant as the particulars of the offence were read over and explained to him in court which enabled him to understand the nature of the offence he was charged with and therefore prepared his defence. Moreover, the above noted defect is curable under **section 388 (1) of the CPA.**

In support of her argument, the learned State Attorney referred the case of **ALLY RAMADHANI SHEKIONDO AND ANOTHER V. R, CRIMINAL APPEAL NO. 532 OF 2017,** Court of Appeal at Arusha where the Court referred the case of **JAMAL ALLY @ SALUM V. R, CRIMINAL APPEAL NO. 52/2017,** where the Court found out that non citations and citations of the inapplicable provision in the statement of the offence are curable under **section 388 (1) of the Criminal Procedure Act, Cap 20 R.E 2019.**

On grounds No. 1, 2, 3, 4, 5, 7, 8, 9 and 10, Ms Kowero submitted that the evidence adduced by the prosecution was enough to warrant conviction of the appellant due to the fact that evidence of the appellant does not tear any doubt to the prosecution case. She insisted that, as the rule goes that, best evidence in sexual offences comes from the victim; in the proceedings PW2 (sic) / the victim who promised the court to tell the truth and not lies, testified on how the appellant raped her several times, gave her a gift of Tshs 1000 and threatened her not to tell anyone otherwise he would kill her. Ms Kowero submitted further that, PW2's testimony was supported by PW1, PW3, PW4/ exhibit P1 and PW5 whereby PW3 and PW5 (sic) saw the Tshs 1000 that the appellant gave the victim. That, PW4/ EXH P1/PF3, which shows that the victim had no hymen and that she has been penetrated. So, penetration was proved and the perpetrator was properly identified which are the key elements that are required to be proved in a sexual offence case.

The learned State Attorney went on to state that it was true that there were minor contradictions and inconsistencies in the prosecution evidence but that does not go to the root of the case hence does not dismantle the prosecution case. That, the only contradiction and inconsistence is on the date whereby PW5 (sic) said it was on the 9th October when she saw her sister PW2 (sic) with Tshs 1000 which upon questioning her, PW2 told her that the appellant gave it to her as a gift after he had raped her. They went to PW3 (sic) on the next day that is 10th October and PW3 supported that on her testimony in court. PW2 (sic) said that she was raped by the appellant for the last time on 10th October. Ms Kowero continued to admit the confusion of dates, but

alleged that the same were minor contradictions which are bound to happen in every trial due to lapse of time, horror, errors in memory due to lapse of time etc. Ms Kowero was of the opinion that, since the act occurred around October, 2019 and the victim and other witnesses testified in April and May, 2020, it was inevitable for such minor contradictions to occur. She cited the case of **MARAMO SLAA HOFU AND THREE OTHERS VS THE REPUBLIC, CRIMINAL APPEAL NO. 246 OF 2011, COURT OF APPEAL OF TANZANIA AT ARUSHA,** (Unreported); in which the Court referred to the case of **SAID ALLY ISMAIL V. REPUBLIC, CRIMINAL APPEAL NO. 249 OF 2008,** in which it was held that:

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

On the issue that the trial Magistrate did not consider his defence, Ms Kowero submitted that the same was not true. She referred at page 8 of the judgment of the trial court where the trial Magistrate considered the defence of the appellant by finding that, the appellant did not prove that he was under police custody on 10th October, 2019. Also, the appellant failed to cross examine PW1/ the victim's mother on the grudges they had. Therefore, it was the view of Ms Kowero that the above allegations were an afterthought and should not be given weight.

It was concluded by the learned State Attorney that this appeal be dismissed and up conviction be upheld. Concerning sentence of the trial court, Ms Kowero prayed that since the victim was 8 years old,

and as per section 131 (3) of the Penal Code which provides that a person who commits an offence of rape to a girl under the age of ten years, shall on conviction be sentenced to life imprisonment. Ms Kowero prayed that the Court should alter the sentence and the appellant be sentenced to life imprisonment as required by the law.

From thorough consideration of the grounds of appeal, submissions of both parties as well the trial court's record, from the outset there is contradiction in respect of the date when the offence was committed. The Preliminary hearing which was conducted on 24/01/2020 is to the effect that the offence was committed on 11/10/2019 while PW2 testified to the effect that the offence was committed on 10/10/2019. On 31/3/2020 the prosecution prayed to change the date and time on the charge sheet orally. Their prayer was granted, thus date and time on the charge sheet was altered by using a pen to read 10/10/2019 at 13:00hrs. However, a PF3 which was admitted as prosecution exhibit shows that the date when the incidence happened is not known. I wish to quote from the said PF3 the section filled by the police, it reads:

> *"**Date and details of alleged offence:** (KUBAKA) KULAWITI. Mnamo **tarehe na mwezi hakumbuki,** mwaka 2019 huko Handeni Banda aliingiliwa kinyume na maumbile na mtu aitwaye Joseph Hendru.*
>
> *G. 7332 D/C ISMAIL. ("*Emphasis added).

The appellant submitted that variance of date proves that the offence was fabricated against him. The learned State Attorney alleged that the contradiction of date of commission of offence was minor, thus not fatal and that the same was curable under **section 388 (1) of the CPA.**

The issue is whether the said contradiction in respect of date of commission of the offence amounts to a minor discrepancy as alleged by the learned State Attorney.

In the case of **Simon Abonyo V. Republic, Criminal Appeal No. 144 of 2005,** Court of Appeal of Tanzania at Mwanza held inter alia that:

> *"The importance of proving the offence as alleged in the charge hardly needs to be over emphasized. From the charge, the accused is made aware of the case he is facing with regard to the time of the incident and place so that he would be able to marshal his defense."*

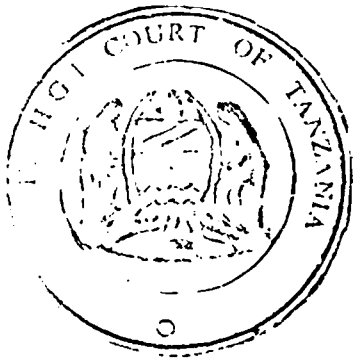
In this matter it is not certain when was the alleged unnatural offence committed. With respect, I am of considered view that the date, time and place of commission of the offence should not be speculated at any cost in order to prove the offence charged beyond reasonable doubts. The prosecution was obliged to prove the date, time and place of commission of offence beyond all shadows of doubts. In other words, contradictions in respect of date of commission of offence is not minor as alleged by the learned State Attorney as the same goes to the root of the matter.

Apart from the above noted anomaly, I have also noted that the learned State Attorney in her submissions referred to the victim as PW2 while in this case the victim is PW3. Also, she referred to the sister of Flora as PW5, while the said witness testified as PW2. Worst of all, throughout her submissions, Ms Kowero submitted in respect of the offence of rape while the appeal before us is in respect of unnatural offence. With due respect,

possibly the allegation by the appellant that the offence was fabricated against him due to grudges with the family of the victim might be true. This Court is of considered opinion that uncertainty of date of commission of offence and confusion in the reply submissions of the Respondent Republic raises some reasonable doubts on part of the prosecution. It is settled law that the same should be resolved in favour of the appellant. It is on that basis that this appeal is allowed. Conviction and sentence of the trial court is hereby set aside. The appellant should be released from custody immediately unless held for other lawful reasons.

It is so ordered.

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



S. H. SIMFUKWE

JUDGE

17/2/2022