

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**MBEYA DISTRICT REGISTRY**  
**AT MBEYA**

**CRIMINAL APPEAL NO 31 OF 2022**

*(Originating from Criminal Case No. 41 of 2021 in the District Court of Chunya at Chunya.)*

**THE DIRECTOR OF PUBLIC PROSECUTION .....APPELLANT**

**VERSUS**

**JUMA S/O TANGANYIKA .....RESPONDENT**


**JUDGMENT**

Date of last order: 13<sup>th</sup> March, 2023

Date of judgment: 20<sup>th</sup> March, 2023.

**NGUNYALE, J.**

In this appeal the Director of Public Prosecution is aggrieved by sentence meted to the respondent by the trial court. The respondent was charged before the District Court of Chunya in Criminal Case No. 41 of 2021 with unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap 16 R: E 2019] "the Code". It was alleged that the respondent on 25<sup>th</sup> January, 2021 at Kiwanja Village within the District of Chunya had carnal knowledge of a boy aged eight (8) years against the order of nature. To protect his modest will be referred as the victim or PW1. He denied the charge.



Upon a full trial the Magistrate was satisfied that the prosecution had managed to prove the case to the hilt and consequently convicted him. Before sentencing the respondent, he received aggravating factors from the prosecution and the respondent made his mitigation. In imposing the sentence, the Magistrate found the accused was 18 years and the first offender. He then condemned him to be inflicted six strokes of corporal punishment and was ordered to pay compensation of Tsh. 1,000,000/= to the victim's mother. The appellant is aggrieved by the sentence imposed, filed the petition of appeal predicated on one ground, that;

- 1. That the trial magistrate erred in both in point of law and fact for failure to sentence the respondent in accordance with the law.*

When the appeal was called on for hearing Baraka Mgaya, learned Senior State Attorney appeared for the appellant. The respondent was absent despite being served through substituted service by publication in Nipashe Newspaper three times November, December, 2022 and February 9, 2023. Upon being satisfied that service of summons was done I allowed the matter to proceed *ex-parte*.

In his submission Mr. Mgaya submitted that the law imposes the sentence of life imprisonment or not below thirty years imprisonment for unnatural offence depending on the age of the victim. He said that the Magistrate relied on the age of 18 years while section 154 does not differentiate the sentence for the offender below or above 18 years. He continued to



submit that the parliament considered unnatural offence as peculiar hence it enacted heavy sentence to be imposed as deterrence for commission of the same. He added that the age of majority as per article 5(1) of the Constitution is 18 years old while section 4(1) the Law of the Child Act, a child is the one below 18 years old. He contended that the statute should be interpreted in its ordinary meaning by referring me to the case of **Republic vs Mwesige Geoffrey & Another**, Criminal Appeal No. 355 of 2014. He concluded that the sentence imposed to the respondent was improper and this court has the power to impose the proper sentence.

I have considered the submission by the appellant, the only issue for my determination is whether the appeal has merits. Admittedly sentencing is a judicial process. The sentencing powers by any court must therefore be exercised judicially and not arbitrarily. Sentencing is not a mechanical process but a balancing act, taking into account the needs of the community and that of the accused. Furthermore, a sentence imposed must have a clear objective and properly rationalized otherwise it becomes a non-utilitarian mechanical process. In law, a person is said to have been sentenced properly if he is charged under a law which creates a specific offence and prescribe a specific punishment for the offence: See **Juma Mniko Mhere vs Republic** [2015] TLR 97.



In this appeal the Magistrate imposed the sentence of six strokes of cane and payment of compensation to the victim's mother. The appellant is challenging this sentence to be improper and contrary to the law. Taking the boat is section 154(1) (a) (2) of the Code which creates the offence and prescribes the punishment. The very section reads;

*'1) Any person who-*

*(a) has carnal knowledge of any person against the order of nature; or*

*(b) N/A*

*(c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*

*(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment.'*

The above law prescribes two kinds of punishment depending on the age of the victim. For the victim below eighteen years the offender is to be sentence to life imprisonment and in any other case to not less than thirty years imprisonment. see **Omary Juma Lwambo vs The Republic**, Criminal Appeal No. 176 of 2020 (Unreported).

In sentencing the respondent, the Magistrate mainly gave two reasons **one**; that was the first offender and **two**; was eighteen years. I agree with Mr. Mgaya that the Magistrate might had in mind section 131 (2) of the Code that where the offence of rape is committed by a boy who is of



the age of eighteen years or less and is a first offender, be sentenced to corporal punishment only. Unfortunately, that provision applies only to punishment for rape and not all sexual offences under PART XV of the Code. Both reasons given by the Magistrate were erroneous, the Magistrate had no option but to impose the statutory punishment of life imprisonment however good the mitigating factors might be because the victim was below eighteen years. Therefore, the sentence of six strokes and compensation was illegal and this court has power to interfere as right submitted by Mgaya.

Given this position, the appeal is allowed. I hereby quash and set aside the illegal sentence of six strokes and the order for compensation of Tsh. 1,000,000/= imposed upon the respondent and substitute it with the sentence of life imprisonment prescribed under section 154(2) of the Penal Code.

DATED at MBEYA this 20<sup>th</sup> day of March, 2023



  
**D.P. Ngunyale**  
**Judge**