

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO 6 OF 2023**

*(Originating from the District Court of Kilwa at Masoko in Criminal Case No 74 of 2022)*

**SAID REHANI SHAMTE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*14<sup>th</sup> & 28<sup>th</sup> June 2023*

**LALTAIKA, J.**

The appellant herein **SAID REHANI SHAMTE** was arraigned in the District Court of Kilwa at Kilwa Masoko charged with the offence of Unnatural Offence c/s 154(1) (a) of the Penal Code Cap 16 RE 2022. It was the prosecution's story that on the 25/7/2022 at Somanga Village in Kilwa District, Lindi Region, the appellant had unnatural carnal knowledge with one **JUMA GULAMATI KITANA**.

When the charge was read over and explained to the appellant (then accused) he denied the offence. The trial court entered a plea of not guilty

and proceeded to conduct a full trial. The prosecution paraded 3 witnesses and tendered one exhibit. The appellant was the only defence witness. He also narrated his part of the story in the form of his defence. Having been convinced that the prosecution had left no stone unturned in proving their case, the learned trial magistrate convicted the appellant as charged and sentenced him to serve 30 years imprisonment and pay compensation to the tune of TZS 1,500,000/ to the victim.

Dissatisfied, the appellant has appealed to this court on six grounds. For ease of reference, they are reproduced hereunder:

1. *That, the appellant pleaded not guilty to the offence charged, because he did not commit the alleged offence in question as it was fabricated on him by the prosecution side.*
2. *That, the trial court erred in law and fact in convicting and sentencing the appellant by its holding that the testimony of PW2 and PW3 is direct while as a matter of law their evidence are hearsay as they heard from PW1 (the Victim).*
3. *That, the trial court erred in law and fact in convicting and sentencing the appellant of the offence of Unnatural offence while the evidence of PW1 and of the other witness did not prove the necessary ingredients of the offence.*
4. *That, the trial court erred in law and fact in convicting and sentencing the appellant without considering that the Evidence adduced by the doctor did not prove that the appellant committed the Unnatural offence against the Victim.*
5. *That, the trial court erred in law and fact when convicting and sentencing the appellant without taking into account the Age of PW1 (the victim) and the time when the incident occurred.*
6. *That, the trial court erred in law and fact in convicting and sentencing the appellant because the prosecution side failed to prove its case beyond reasonable doubt and unfortunately the trial court convicted and sentenced the appellant on the weakness of Evidence of defence side rather than on the strength of the Evidence of Prosecution side.*

When the appeal was called on for hearing, the appellant appeared in person, unrepresented. **Ms. Atuganile Nsajigwa**, learned State Attorney, appeared for the respondent Republic. Not being learned in law, the

appellant chose not to add anything to the grounds of appeal hitherto filed in court. However, he reserved his right to a rejoinder should conditions dictate and prayed that the learned State Attorney proceeds.

Taking the podium, Ms. Nsajigwa declared that the respondent was not in support of the appeal and wished the trial courts conviction and sentence would be upheld.

Ms. Nsajigwa stated that she would address the grounds immediately as they all touched upon the complaint that the prosecution had not proved its case beyond reasonable doubt. She informed the court that the appeal concerned an unnatural offense and mentioned that the incident had occurred on the 25th of July 2022. She further stated that the appellant had entered the house of PW2, also known as YUSUPH ALLI MUSA @Timberland, where the victim resided as his guardian.

Ms. Nsajigwa explained that on the fateful day, while PW1 was in the backyard, the appellant had undressed and sodomized him. Referring to page 5 of the trial court proceedings, she pointed out that the victim had stated that the appellant had engaged in such behavior multiple times, both in the market and on the roadside.

According to the victim's account, after being sodomized, the appellant had given him TZS 2000. The victim immediately cried out, and when his mother arrived, he narrated what had happened. Ms. Nsajigwa referred to the case of **SELEMANI MAKUMBA V. R [2006] TLR 384**, where the Court had stated that the true evidence of rape had to come from the victim. She also cited the case of **GOODLUCK KYANDO VS. REPUBLIC [2006] TLR**

**363**, where the apex Court had emphasized that every witness should be given credence and their testimony accepted unless there were good and cogent reasons to doubt them.

Based on the above, Ms. Nsajigwa argued that it was evident that the victim had explained what had happened. She further supported this claim by referring to the testimony of **PW3 Dr. Rajabu Abdallah**, a medical doctor, who had informed the trial court that on the 26th of July 2022, he had examined a patient and conducted tests as required. Therefore, Ms. Nsajigwa insisted that the case had been proven beyond reasonable doubt.

The **appellant**, on his part, stated that he had heard the learned lawyer. He expressed his disagreement with the allegations and asserted that the district court had treated him unfairly. He clarified that he had no prior knowledge of the complainant and had never seen him before. Their first meeting had taken place in court. However, he acknowledged being acquainted with PW2, who claimed that the victim had been residing in his house. The respondent mentioned that he and PW2 had quarreled in the past due to suspicions that he was having an affair with PW2's wife.

I have dispassionately considered the grounds of appeal, the submission by the learned State Attorney objecting the appeal and, more importantly, the lower court records. I am inclined to start with the latter. I must say that upon going through the judgement it was intriguing on how brief it is. I can also say that the same **left a lot of issued unanswered**, so I decided to consult the typed proceedings as well. When PW1 was testifying, his age is not indicated. I thought that was a clerical error until I

saw that the entry was correctly recorded for other witnesses. I am left with a very burning question: **how old was the victim?** Definitely he must have been an adult that is why his name is mentioned in full and the process for recording his evidence does not involve the *vore dire* related process.

Assuming that the victim was an adult, was he raped? The answer is probably no because he mentioned in his testimony that the appellant had had carnal knowledge with him "several times" including in the market and by the roadside. Why wasn't he charged for permitting a male person to have carnal knowledge with him against the order of nature? The offence of unnatural offence like other sexual offences is not a one-way traffic. It takes two to tangle. Both the appellant and the purported victim should have been arraigned in court to face justice. That is the position of the law that I am aware of unless of course, the victim is a minor and incapable of consenting.

Still on the lower court records, I must say with due respect that the trial court's judgement lacked the rigour needed in terms of reasoning and analysis of evidence before it. In the case of **MKULIMA MBAGALA V. R**, Criminal Appeal No. 267 of 2006 (unreported) it was stated:-

*"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case .... is more cogent. In short, such an evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at."*

For example, the learned Magistrate does not say why he believed the evidence of PW1 who allegedly left the family house with a mattress to sleep outside because "it was hot." What time was that? How far was the backyard from the living room or any of the bedrooms in the main house? What was the source of light and how did the victim identify the appellant?

The learned Magistrate also accepted rather uncritically the evidence of PW2 the purported guardian of the victim who, allegedly, rescued the victim from "difficult environment" and brought him to live with his family. No questions were asked on when such guardianship began. No information was given on how the family was organized. Such gaps left a lot to be desired.

This brings me to the second ground of appeal. In the case of **WILLIAM NTUMBI v. DPP** Crim App 320 of 2019. The Court of Appeal stated that even the evidence of a single witness can sustain conviction if the witness can be believed to give all the surrounding circumstances on how the offence occurred. In the present case that is not the case. As alluded to above, the trial court failed to unveil the witness to enable this court to assess his credibility while exercising its function, as the first appellate court of reevaluating the evidence.

As far as the defence case is concerned, it is indicated throughout the trial court records that the appellant distanced himself from the allegations. He went as far as asserting that he never knew the victim. He only knew PW2 the purported guardian with whom he once had a brawl related to marital fidelity. The appellant being suspected of having an affair with PW2's wife.

In the case of I am also alive to the **JOHN MAKLOBELA KULWA AND ANOTHER V. R.** [2002] TLR 296 the Court of Appeal of Tanzania stated:

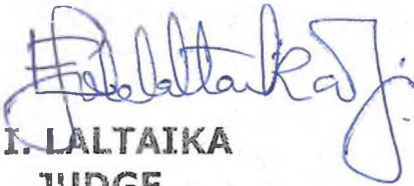
*"A person is not guilty of a criminal offence simply because his defence is not believed. Rather a person is found guilty and convicted of a criminal offence because of the strength of the prosecution case that has proved the case beyond reasonable doubt"*

The weakest part of the prosecution case in the matter at hand is credibility of the victim. Inability of the court to indicate his age and dig deeper on how he was allegedly "rescued" from "the street" makes the whole case closer to fabricated ones. No one should be allowed to "rescue" people from homelessness and street life only to use them for furtherance of even worse cause(s).

Premised on the above, I allow the appeal. I hereby quash the conviction and sentence of the lower court. I order that **SAID REHANI SHAMTE** be released from prison forthwith unless he is being held for any other lawful reason(s)

It is so ordered.



  
**E.I. LALTAIKA**  
**JUDGE**  
**28/6/2023**

Court

This Judgement is delivered under my hand and the seal of this court this 28<sup>th</sup> day of June 2023 in the presence of Mr. Melchior Hurubano, learned

State Attorney and the appellant who has appeared in person, unrepresented.

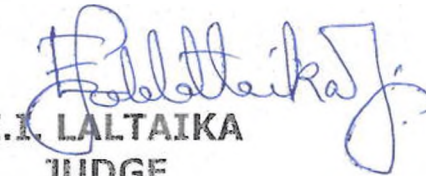


  
E.I. LALTAIKA  
JUDGE  
28.06.2023

**Court:**

The right to appeal to the court of appeal of Tanzania fully explained.



  
E.I. LALTAIKA  
JUDGE  
28.06.2023