IN THE HIGH COURT OF TANZANIA

IRINGA SUB - REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 54 OF 2023

(Originating from the District Court of Iringa at Iringa in Criminal Case No. 09 of 2023)

AMAN MARTIN KASISI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

07th & 27th March 2024

LALTAIKA, J.

The Appellant herein **AMAN MARTIN KASISI** was arraigned in the District Court of Iringa at Iringa charged with one count of unnatural offence contrary to Section 154(1)(a) and (2) of the Penal Code Cap 16 R.E. 2022. The allegation was that on the 4th day of April 2023 at **Nzihi village** within the District and Region of Iringa he had carnal knowledge of a girl child aged nine (name concealed to protect her dignity) against the order of nature.

When the charge was read over and explained to the appellant (then accused) he denied wrongdoing. This necessitated the conducting of a full trial. To prove the allegation, the prosecution paraded a total of five (5) witnesses (whom I will later refer simply as PWs) and tendered one

documentary exhibit. Halfway through, the trial court made a finding that the appellant had a *prima facie* case to answer. He was placed on the **witness doc as the one and only defence witness (DW1)**.

Having been convinced that the prosecution had left no stone unturned in proving its case, the learned trial magistrate convicted the appellant as charged. He proceeded to sentence him to serve a thirty years' imprisonment term. Dissatisfied with this decision, the appellant has appealed to this court by way of a petition of appeal lodged on 12/7/2023 containing the following grounds:

1. *That the trial Court erred in fact and law by failing to call material witness to give testimonies in trial court.*
2. *That the trial court erred in fact and law by convicting and sentencing the Appellant basing on contradictory evidence.*
3. *That the trial court erred in fact and law by convicting and sentencing the appellant who did not flee from arrest.*
4. *That the trial court erred in fact and law by convicting and sentencing the appellant with unexplained delay to arraign the accused in court contrary to the section 32(1) of the Criminal Procedure Act, [Cap 20 RE 2022].*

5. *That the trial court erred in facts and law by convicting and sentencing the Appellant on allegation of unnatural offence which was not proved beyond a reasonable doubt.*
6. *That the trial court erred in fact and law by convicting and sentencing the Appellant without firstly scrutinize (sic!) the evidence by the star witness (sic!), PW1 and that of PW2.*
7. *That the trial court erred in both law and fact by determining the case among witnesses, found on hearsay evidence.*

When the appeal was called for hearing on the 7th day of March 2024, the appellant enjoyed the legal services of **Mr. Joshua Chussy, learned Advocate**. The respondent Republic, on the other hand, appeared through **Ms. Sophia Manjoti**, learned State Attorney (SA). The next part of this judgement is on submissions by both parties.

Taking the podium, Mr. Chussy elaborated that he would merge the 5th, 6th, and 7th grounds, then he proceeded as follows: On **the first ground,** he raised a substantial complaint regarding the failure to summon material witnesses crucial to the case. Specifically, he pointed out the omission on page 6 of the proceedings where a generalized reference to "siblings" was made. Mr. Chussy underscored the significance of these potential witnesses, suggesting that their testimony could shed light on the

victim's behaviour before and after the alleged incident. To bolster his argument, he cited this court's case of **SAIDI ABDALLAH BIN ALLY v. REPUBLIC** Crim Appeal No 132 of 2021 HCT, Dar (Unreported), where His Lordship Mruma J. emphasized the importance of considering contextual factors such as the age of the victim and the appellant.

Drawing from this, Mr. Chussy contended that the failure to call upon such pivotal witnesses could warrant adverse inferences, citing the ruling in **OMARI HUSSEIN @LUDANGA & HASHIM ABDALLAH @SIMBA v. R.** Crim App 547 of 2019 CAT, Arusha, which underscored the court's prerogative in such matters.

Transitioning to the **second ground**, Mr. Chussy meticulously dissected purported inconsistencies of PW1, highlighting notable contradictions in her narrative. He specifically referenced page 6 of the proceedings where PW1 initially claimed to have been "praying with my siblings" but later stated "when it was done, I went back to play with my siblings." Such discrepancies, Mr. Chussy argued, raised serious doubts about the veracity of her testimony. To fortify his position, Mr. Chussy referenced the Court of Appeal case of **AWADH ABRAHAMANI WAZIRIC**

v. R. Crim Appeal No 303 of 2014 CAT, Arusha (unreported) and **MOHAKED SAID v. R.** Crim Appeal No 145 of 2017 CAT, Iringa (Unreported).

Moving on to the third ground, Mr. Chussy averred material irregularities surrounding the chronology of events and the subsequent investigative procedures. Specifically, he pointed to alleged discrepancies regarding the reported date of the incident, the subsequent reporting to authorities, and the timeline of police interrogations. Such discrepancies, Mr. Chussy reasoned, cast doubt on the integrity of the investigation and the reliability of the evidence presented. To substantiate his argument, Mr. Chussy referenced the case of **ALLEN FRANK MAGUZO v. REPUBLIC** Criminal Appeal No 46 of 2021, which underscored the importance of timely arrests to preserve the integrity of the prosecution's case.

Moving to the fourth ground, Mr. Chussy highlighted the unexplained delays in arraigning the appellant in court, emphasizing the statutory requirement for prompt arraignment as prescribed under section 32(1) of the Criminal Procedure Act Cap 20 (the CPA). He referenced the case of **RAMSON PETER ONDILE v. REPUBLIC** Crim Appeal No 84 of 2021 CAT, Dar, which underscored the potential for such delays to undermine the credibility of the prosecution's case.

Regarding the fifth ground, Mr. Chussy pointed to what he regarded as "a myriad of doubts" surrounding the prosecution's case, including contradictions in testimonies and procedural irregularities. He referenced several of this court's decisions such as **RUTAHAKANWA SIMEO v. R**. Crim Appeal No 85 of 2021 HCT Bukoba where His Lordship Kilekemanjenga, J. emphasized the need for meticulous scrutiny of evidence in cases of alleged sexual offenses.

In his conclusion, Mr. Chussy reiterated his plea for the appeal to be granted based on the substantial legal arguments presented and the inherent doubts surrounding the prosecution's case.

Ms. Manjoti, the learned State Attorney, on her part, began by expressing her disagreement with the appeal, declaring boldly that that she did not support. Ms. Manjoti proceeded to address each ground of appeal presented by Mr. Chussy as summarized in the following paragraphs.

Regarding the first ground, she refuted the assertion that the prosecution failed to summon material witnesses, emphasizing the paramount importance of the victim's testimony in sexual offense cases. Citing the case of **SELEMANI MAKUMBA v. R** [2006] TLR 8, the learned

State Attorney emphasized that the victim's account constitutes the best evidence in such cases.

Ms. Manjoti further argued that the victim's testimony on page six of the proceedings, where she vividly described the alleged offense, demonstrated her ability to provide crucial evidence. She cited the case of **LEONARD RAYMOND v. R.** Crim App 211 of 2016 CAT, Mtwara, to underscore the prosecution's burden to prove penetration, which she contended was sufficiently established through the victim's testimony.

Moving on **to the second ground,** Ms. Manjoti disputed the claim of contradictory evidence leading to the appellant's conviction. She contended that there were no contradictions with PW1's testimony, highlighting the victim's consistent assertion of the appellant's actions. Additionally, she defended PW3, the medical doctor, stating that his testimony corroborated the victim's account of penetration. Ms. Manjoti addressed discrepancies in dates mentioned by various witnesses, asserting that these **were minor and did not undermine the overall coherence** of the prosecution's case.

Conjointly addressing the third and fourth grounds, Ms. Manjoti argued against the allegations of irregularities in the investigative process and the delay in arraigning the appellant. She asserted that the appellant's arrest

and subsequent proceedings were conducted in accordance with proper legal procedures. Contrasting the case cited by Mr. Chussy, she maintained that the circumstances differed significantly and did not warrant similar scrutiny.

Moving to the fifth ground, Ms. Manjoti defended proof of the prosecution's case, stating that it was indeed proved beyond a reasonable doubt. She highlighted the prosecution's adherence to legal requirements, including proper narration of charges and presentation of corroborative evidence. Addressing concerns about the lack of a cautioned statement and the absence of certain witnesses, she argued that such factors did not diminish the strength of the prosecution's case.

Responding to the sixth ground, Ms. Manjoti clarified the terminology used by Mr. Chussy, stating that the court had indeed ensured a fair trial by allowing cross-examination of the victim. She dismissed claims of hearsay evidence, reiterating the sufficiency of the victim's testimony in securing a conviction.

Concluding her response, Ms. Manjoti emphasized the coherence and strength of the prosecution's case, urging the court to dismiss the appeal for lack of merit.

Mr. Chussy, **in a not-so-brief rejoinder**, addressed the court's attention to several points: He contested the assertion made by the learned state attorney regarding the siblings' testimony, arguing that Section 127(2) of the TEA permits children of tender age to testify, citing ONDILE's case in support of his argument.

On contradictions, Mr. Chussy emphasized that the appellant's side had identified the contradictions from the records, not from speculation. He expressed concern about the delay in conducting tests, suggesting that such delays should be viewed with suspicion by the court. Regarding discrepancies in dates, he attributed the confusion to errors in the typed records.

Mr. Chussy pointed out that the appellant's mention of the victim's mother as his wife remained problematic, as it was recorded in the court records. He argued that the timeframe for arraignment should not exceed 24 hours, and going beyond six days was abnormal in the court's practice.

Regarding the cautioned statement, Mr. Chussy highlighted its importance in understanding how the appellant was arrested. He also noted that the trial court should have been informed of any hostile witnesses. In conclusion, Mr. Chussy reiterated his plea for the appeal to be granted and for the nullification of the sentence and conviction.

I have dispassionately considered the rival submissions and carefully examined the lower court's records. It is very difficult to resist the temptation to declare straight away that I find the exercise to connect the dots in the present appeal very difficult indeed. I will try to employ the art of story telling along with the OWEP (Offence, Witnesses, Evidence and Principles) tool of analysis to arrive to a conclusion that I strongly believe, had the learned trial magistrate taken an extra mile in his imagination, he would have arrived at the same conclusion.

The Appellant was married to the mother of the victim (I choose not to disclose the name of the mother as well) for eight years. Like many, if not most other marriages, theirs was not perfect. Nevertheless, they were blessed with four daughters in addition to the victim who was from another relationship. It appears that the Appellant got married to the mother of the victim when the victim was hardly one year old. The victim's biological father, who would testify in court as PW3, started clearly that he never lived with the mother of his daughter. It appears that he did not know the appellant closely either.

It was on the 6th day of April 2023 that an unknown informer approached the Police Gender Desk at Iringa with some terrible news. It was

alleged that a father of five daughters had sodomized all her daughters. The officers took the tip most seriously. PW4, Head of the Gender Desk communicated **with Nsihi Village authorities** and to all children living with the appellant were summoned. They were taken to hospital for examination. Save for the victim (PW1) medics cleared all doubts regarding any form of sexual abuse against other four girls. The appellant was then arraigned for having carnal knowledge with her stepdaughter against the order of nature.

On the offence charged, I entertain no doubt that it is a VERY SERIOUS CRIME in our country. It attracts the minimum sentence of thirty years' imprisonment. On proof, if the alleged victim is a child, as in the present matter, our law requires spot on proof of the age. The law also requires proof of penetration however slight. See the cases of.....rial court records indicate that the appellant was arraigned is the

Finally in the offence section, it is vital to ensure that that the facts or the story behind commission of an alleged offence is logically discernible or at least humanly possible. Lack of coherence or consistency would generally raise a red flag. That is why I started with storytelling.

On the Witnesses part, like I stated earlier, I find it very difficult to connect the dots especially on PW1's testimony. Here are some of my reservations. PW1 the victim, told the trial court that she was playing with her siblings when her father called her (I assume to a separate room) raped her against the order of nature and she went back to play. I find so munch impracticality in this narrative. I must admit also that the trial court's records used the words PRAY and PLAY interchangeably. I took the liberty to assume that the learned trial Magistrate hails from either of those parts of our Republic where proper use of the letters "L" and "R" are, to the majority, a lifelong struggle. Here is the relevant part:

> *'On the 4th April 2023 when I was **praying** with my siblings I went inside to fetch drinking water, my father called me inside his room, I entered, he started to undress my trouser...he took the organ he uses to urinate and penetrated it into my anus. I did not shout, he threatened to behead me...When it was done, I went back to **play** with my siblings.'*
> (Emphasis added)

Why did I choose to believe that the word praying was supposed to be playing? Very simple, in this part of the planet, often, children PRAY with their families but PLAY with one other. It is unlikely that the victim was

PRAYING with her siblings including probably singing praises and worshipping while the appellant was waiting quietly to prey on the victim. Playing sounds less scary.

Mr. Chussy forcefully argued in support of the first ground that the prosecution failed to summon material witnesses. I agree. The so-called siblings would have helped the trial court in expanding the factual terrain. Be it as it may, my biggest astonishment, as I was reading through the lineup of the prosecution witnesses such a conspicuous absence of anyone who could shed some light on the link between the Appellant and the alleged offence. Here is the lineup: PW1 (victim), PW2 (biological father of the victim who never raised her) PW3 (Clinical Officer who tendered the PF3) PW4 (Head of the Police Gender Desk) and PW5 (Investigative Officer).

Let me be bold enough here to state that the totality of the five witnesses amounted to nothing more than mere speculation. I expected that the mother of the victim who knew both the appellant and PW2 her former lover would be summoned. Let me emphasize that I am alive to long standing precedents in our jurisdiction that to the effect that evidence of a victim in sexual offences is the best evidence and is capable of grounding conviction. Nevertheless, every case is unique.

On evidence, it appears that the learned trial Magistrate relied on the evidence of PW1 as proof of penetration. I think this is where the learned trial Magistrate failed to spot inconsistencies. Specifically, although Mr. Chussy did not seem to bother more about it, I find PW5's (the investigative officer) allegation that he gathered during his investigation that the Appellant had committed a similar offence against the same victim when she was three years extremely worrying. I think the Detective needed to stick to his guns to prove the offence he had investigated. This inconsistence, in my opinion, should have been addressed by the learned trial Magistrate. In the case of **MOHAMED SAID MATULA v. R**. [1995] TLR 22 on p. 48.

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and resolve whether the inconsistencies and contradictions are only minor, or they go to the root of the matter."*

Finally on principles, it is common knowledge that in criminal cases it is it is the duty of the prosecution to prove its case beyond reasonable doubt. See **WOODMINTON V. DPP** [1935] AC 462. It does not take much thought to realize that in the matter at hand, the prosecution failed to discharge that duty at the required standard. I understand that the police Gender Desk

probably acted in good faith in responding to their informer's allegations that the Appellant was sexually abusing his own daughters. However, that does not mean such stories cannot be fabricated.

In the like manner, the trial court should have warned itself against grounding conviction on the weakness of the defence case. The wisdom handed down by the Apex Court in our country in **JOHN MAKOLOBELA KULWA AND ANOTHER V. R.** [2002] TLR 296 is worth revisiting:

> *"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."*

In the upshot, I allow the appeal. I hereby quash conviction and set aside the sentence of thirty years imprisonment. Further, I order that the Appellant **AMAN MARTIN KASISI** be released from prison forthwith unless he is being withheld for any other lawful cause.

It is so ordered.

E.I. LALTAIKA
JUDGE
27.03.2024

HIGH COURT OF TANZANIA - IRINGA

Court

Judgment delivered under my hand and the seal of this Court this 27th day of March 2024 in the presence of Ms. Rehema Ndege, learned State Attorney for the Respondent and the Appellant who was represented by Advocate Joshua Chussy.

E.I. LALTAIKA

JUDGE

27.03.2024

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA

JUDGE

27.03.2024

HIGH COURT OF TANZANIA - IRINGA