

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO 40761 OF 2023

(Originating from Criminal Case No 90 of 2022 in the District Court of Babati at Babati)

FADHIL SAID.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14th March and 10th May, 2024

MIRINDO, J.:

On 31/5/2022, a woman went to the market with her four-year-old daughter. She was selling groundnuts and her child who was playing around disappeared. It later transpired that a man had appeared, pointed a finger towards her and took her to the bush and had carnal knowledge with her against the order of nature. She shouted for help, the man left and went to a local bar. In the meantime, when the victim's mother noticed that the victim was missing, she decided to trace her. She found the victim with the man who is claimed to be Fadhil Said, the appellant in this case. There were beggar's ticks on her clothes. The child could not walk properly and her anus was bleeding. The appellant ran away and was arrested at Kimario Bar.

On his trial before Babati District Court for unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [Cap 16 RE 2019] the appellant denied the charge. At the conclusion of the trial, he was convicted as charged and sentenced to life imprisonment.

He has appealed to this Court on eight grounds of appeal. At the hearing of the appeal, the appellant appeared in person and had nothing to add to his grounds of appeal. The respondent Republic was represented by Ms Rose Kayumbo and Ms Esther Malima, learned State Attorneys who opposed the appeal and argued that the charge was proved beyond reasonable doubt.

This is a first appeal from the decision of the trial District Court in which this Court has a duty to re-assess the evidence before the trial court and draw its own conclusions. As stated by the Court of Appeal in **Kasema Sindano alais Mashuyi v R**, Criminal Appeal 214 of 2006:

The law, as we understand it, is that on a first appeal, it is the appellant's legitimate right to have the entire evidence re-evaluated by the appellate court. The appellant is entitled to have that court's own consideration and views of the entire evidence and its own decision thereon. This duty is not discharged if the evidence for both sides is only read separately without being subjected to a fresh and exhaustive scrutiny,

The central question before this Court is: was the charge proved beyond reasonable doubt?

Both the victim, the second prosecution witness and the victim's mother, the third prosecution witness, testified that the victim was playing at the market area in Bonga. Given that both witnesses were at the market area, a place where several people have different activities, it was important to establish their presence at the market and the persons with whom they interacted.

In order to pre-empt appellant's plea of mistaken identity, it was important to detail persons with whom the victim was playing. In cross-examination, she mentioned one Fatuma who, however, did not testify. This was important because the appellant pleaded in his defence that he was mistakenly associated with the offence.

In the fifth ground of appeal, the appellant complained that the second prosecution witness, the victim of the offence and the third prosecution witness, the victim's mother gave conflicting testimony. In dealing with this ground, it is important to state that in the fourth ground of appeal, the appellant complained that the victim confused her mother's name. At the trial, she stated that her mother was called Sarah but her mother who testified stated that she was called Zainabu. In response to this variance, the learned State Attorney, Ms Kayumbo, argued that this ground had no merit because the variance was immaterial. She argued that children of the victim's age do struggle to remember names of their parents and asked the Court to hold that the variance was minor as has been

stated in many cases including **John Gilikola v R** (Criminal Appeal 31 of 1999) [2004] TZCA 13.

In relation to the fifth ground, the learned State Attorney contended that there was no contradiction. The appellant had not pointed out the contradiction and so the ground was vague. In dealing with this point of complaint it is important to revisit the evidence of the second and third prosecution witnesses. The victim testified that on the day of the incident she was at the market when the appellant came, pointed a finger towards her and took her to the bush. He then had carnal knowledge with her against the order of nature. She shouted for help, the appellant left and went to a local bar. Her mother found her at the place "where 'bibi' do wash her clothes."

The victim's mother testified that when the victim disappeared, she found her with the appellant who ran away and was arrested at Kimario Bar. The contradiction here is whether the third prosecution witness found the appellant with the victim. Can this contradiction be explained away? There is no other evidence of what transpired that can be relied upon to clarify this contradiction. In **Sohoba Benjuda v R**, Criminal Appeal No 96 of 1989, a murder offender complained that the trial judge wrongly based his conviction on the conflicting testimony of the sixth prosecution witness. The Court of Appeal dismissed this complaint because the conflicting testimony of the sixth prosecution witness was amply corroborated by the testimony of five prosecution witnesses. In its

judgment delivered by Kisanga JA, the Court of Appeal set forth one of the governing principles in cases of conflicting testimony:

..Because contradiction in the evidence of a witness affects the credibility of that witness and unless the contradiction can be ignored as being only minor and immaterial, the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence...

This contradiction is further complicated by the fact that the evidence of the victim's mother does not conform with common experience. The victim was taken to a bush whose distance from the market area is unexplained and shouted for help but the only person who appeared to the scene was the victim's mother. Why was it so given that the mother walked all the way from the market to the bush to trace the victim. This implausibility of the victim's evidence gives all the more reason to doubt her veracity as was held in **Mathias Bundala v R** [2007] TLR 53 at 59:

...In our considered judgment if a witness is not an infant and has normal mental capacity...the primary measure of his /her credibility is whether his or her testimony is probable or improbable when judged by the common experience of mankind. The assumption will always be that the testimony is true unless the witness's character for veracity has been assailed some motive on his or her part to misrepresent the facts has been established, his or her bias or prejudice has been demonstrated and he or she has given fundamentally contradictory or improbable evidence or has been irreconcilably contradicted by another witness or witnesses. In short, as this Court held in **Goodluck Kyando v R.**, Criminal Appeal No. 118 of 2003 (unreported) "it is trite law that every witness is entitled to credence and must be believed and

his testimony accepted unless there are good and cogent reasons for not believing a witness"....

Lack of details of how the victim's mother moved all the way from the Bonga market area to the bush suggests either the charge of unnatural offence against the appellant was false or the prosecution deliberately omitted to call material witnesses leading to miscarriage of justice. The prosecutorial duty to call material witnesses who would clarify natural doubts was stated in **Peter Mwafrika v R**, Criminal Appeal 413 of 2013 where it was held that:

They would have, in our opinion, given independent evidence on what actually transpired at the scene of crime. Failure to call them without good cause being shown did, in our view, prejudice the course of justice in this case. ... The prosecution, therefore, needed to produce more evidence implicating the appellant, given the serious nature of the offence with which he was charged. The loopholes left unanswered ...should be, in the interest of justice, interpreted in favour of the appellant.

Apart from the victim and her mother, the only witness called to testify about what happened at the crime scene was Hussein Ally, the fifth prosecution witness. His testimony raises more questions than answers. He testified that he runs a business of pool table at Bonga Market and on the day of the incident he was playing pool at Bonga Market at night when he had the voice of a woman screaming for help. The voice came from Bonga Market. He was with many people at the pool table and so they rushed to where the voice was coming from.

On arrival, the victim's mother told them that her child was raped by the appellant. He detailed that with the assistance of other people they traced the appellant and found him at Kimario Bar.

It would be recalled that the victim's mother testified shouting for help after the accused had ran away and that some people helped her in arresting the accused at Kimario Bar.

Several questions arise from the evidence of the fifth prosecution witness. At what time was the offence committed? He suggests that it was night. The fact that the offence was committed at night does not appear from the victim's evidence and that of her mother. Where did the offence take place? He suggests that it was somewhere around Bonga market. Assuming that the first question does not pose any serious challenge to the prosecution case because the appellant admitted both the victim and the victim's mother know him, the second question is more problematic. If the crime took place somewhere around the market, there is unexplained reason why was the victim's mother the first person to find out where the victim was.

The victim testified that her mother found her where the victim's grandmother washes clothes. If this place was somewhere in the Bonga Market, it is uncertain why only the victim's mother was able to locate it and saw the victim and the appellant. There is no account if it is a secluded area in the

market that is not easily accessed with other people. There is no evidential link between Bonga Market and the bush where the victim was found.

On these accounts, I have come to the conclusion that the prosecution case was not proved beyond reasonable doubt. I quash the conviction, set aside the sentence of life imprisonment with an order for appellant's immediate release from prison unless he is otherwise lawfully held. This appeal is allowed.

DATED at BABATI this 8th day of May, 2024.



F.M. MIRINDO

JUDGE

Court: Judgment delivered this 10th day of May, 2024 in the presence of the appellant in person and in the presence of Ms Rose Kayumbo, State Attorney, for the Respondent. B/C: William Makori present.

Right of appeal explained



F.M. MIRINDO

JUDGE

10/5/2024