IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB-REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 71 OF 2023

(Arising from the District Court of Iringa at Iringa

Original Criminal Case No. 147 of 2020)

JUMA MGAYA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

JUDGMENT

Date of last Order: 21/06/2024
Date of Judgement: 28/06/2024

LALTAIKA, J.

The Appellant herein **JUMA MGAYA** was arraigned in the District Court of Iringa at Iringa charged with two counts of unnatural offence c/s 154(1)(a) of the Penal Code Cap 16 RE 2019). He was convicted as charged and sentenced to life imprisonment.

Dissatisfied, the appellant has appealed to this court on 6 grounds. I take the liberty to reproduce them hereunder for ease of reference and record keeping purposes.

1. That, the learned trial magistrate erred both in law and fact to convict and sentence the appellant relying on PW 3 (victim) evidence which was so weak to form the basis of conviction to the appellant but also the evidence was taken without the PW3 being sworn in order to meet the requirement of law.
2. That, the learned trial Magistrate wrongly convicted and sentenced the appellants based on PF3 as exhibit P1 while the PW4 (a doctor) examined the victim after six day passed which makes doubt therein that the result in PF3 was not truthful due of time barrel for elements of sexual offences be real seen.
3. That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant a life sentence without considering that the age of the victim was in question, the age was not proved to be as exhibit to the court to apply the date capital punishment (a life sentence) to the appellant.

4. That, the learned trial Magistrate erred in law to convict and sentence the appellant without take into account that how the appellant arrested first before the date of act to occurred which make more doubts thereof.

5. That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant without considering and evaluating indeed in defence side evidence.

6. That, the prosecution side failed totally to prove the case against the appellant beyond reasonable doubt.

When the appeal was called for hearing earlier today, the Appellant appeared in person. The respondent Republic on the other hand, appeared **through Mr. Sauli Makori,** learned State Attorney. The Appellant, not being learned in law, opted to reserve his rights to a rejoinder while paving the way for the learned State Attorney to respond to the grounds hitherto filed.

Taking up the podium, Mr. Makori declared outrightly that the Respondent was not in support of the appeal. Mr. Makori, the learned State Attorney, addressed the grounds of appeal as follows:

On the first ground, the complaint was that the evidence of PW3 was taken without oath and was insufficient. After reviewing the proceedings, he noted that such evidence was recorded on pages 13, 14, and 15. During cross-examination, the witness stated he was 17 years old. The court noted that despite the witness being 17, he exhibited signs of autism and decided to record his evidence without oath. The witness clearly explained how he was carnally known against the order of nature, identified the appellant as his brother-in-law, Juma Mgaya, and stated that on 13/11/2020 and the following day, the appellant inserted his penis into the witness's anus.

The incident was discovered at school when dirt started coming out of his anus, leading him to inform his class teacher, Iberata Mhelela, who interrogated him. He explained how his brother-in-law committed the offence. The witness also pointed out the appellant in court. Regarding the claim that the evidence was recorded without oath, Mr. Makori referred to Section 127(1) of the Evidence Act, which empowers the court to assess whether a witness can testify without oath due to age or sickness. He submitted that the court was justified in recording the evidence without oath and no law was violated, thus the ground should be dismissed.

On the second ground, the complaint was that the evidence of the medic, PW4, was not sound because the examination was conducted six days after the alleged offence. Mr. Makori submitted that court authorities state that expert evidence in sexual offences is meant to corroborate the victim's evidence, as such offences are often committed in secret, making the victim the best witness. He referenced the case of Godi Kasenegala v. Republic, Criminal Appeal No. 10 of 2008, CAT, Iringa (unreported), pp. 10-11, where the court insisted that the victim's evidence should be believed unless there are compelling reasons otherwise. He prayed for the court to focus on the victim's evidence and its link to the medical doctor's testimony, and to dismiss the ground for lack of merit.

On the third ground, concerning the complaint that the victim's age was not proven, Mr. Makori conceded that this ground had merit as none of the relatives proved the victim's age, and it was only the victim who mentioned being 17. Given the court's observation that the victim was autistic, it was unsafe to rely on his word alone. He prayed for the court to invoke Section 154(1)(c) of the **Penal Code, Cap 16 RE 2022**, to make an appropriate sentence, referencing the case of **Wambura Kiginga v.**

Republic, Criminal Appeal No. 301/2018, CAT, Mwanza (unreported), where it was indicated that the victim's age must be proven for statutory rape.

On the fourth ground, the complaint was that on the date mentioned in the charge sheet, the appellant was already incarcerated. Mr. Makori submitted that this ground had no merit, stating that the dates mentioned were when the offence was committed, and the appellant was later arrested and arraigned in court for the first time on 18/12/2020 after the investigation was completed. He prayed for the ground to be dismissed, noting that no proof was provided to support the claim.

On the fifth ground, the complaint was that the appellant's evidence was not considered before conviction and sentence. Mr. Makori asserted this was not true, noting that pages 9 and 10 of the trial court's records showed that the defence evidence was properly considered, and uncontested issues were identified. He added that if the court found that the evidence was not considered, it could re-evaluate the evidence and come up with its own position, referencing the previously cited case of **Wambura Kiginga** (Supra).

On the sixth ground, the complaint was general, claiming that the prosecution did not prove the case beyond reasonable doubt. Mr. Makori refuted this, stating that the charge sheet indicated the offence was unnatural. The victim explained how she was carnally known against the order of nature, and medical personnel confirmed this through a medical test. PW1, the teacher, testified about the victim's behaviour, and PW2, a relative of the victim, testified about becoming aware of the incident. He submitted that the offence was proven as required by law, noting that the victim and the appellant lived in the same house and the appellant did not object to this fact.

In his rejoinder, the Appellant explained that on 8/11/2020, while he was sleeping in his house, three people came and knocked on his door, informing him that he was required by the Village Executive Officer (VEO). He accompanied them, and the VEO asked him what was wrong, but he knew nothing. She then told him that he was accused of raping Christina Ngimba. He reminded her that he had a quarrel with Christina's mother and that the case was before her. The VEO admitted that he was in conflict with Christina's mother and that was why she told her to proceed with the police case.

He recounted that he was taken to the police and later arraigned in court. A police officer asked him why he was there and then mentioned that he would add another charge. The Appellant disclosed that he was HIV positive and not receiving medication. Consequently, they took him to court, and the magistrate ordered that he be taken to the hospital where he was given antiretrovirals (ARVs).

The Appellant described the conflict between him and the mother of the victim, who is his sister-in-law, explaining that he is married to her younger sister. The conflict arose when he made 500 bricks for her and owed her TZS 250,000. When she gave him the money, the village office demanded TZS 30,000, to which she agreed. He went to drink alcohol, and upon being told that he could no longer use his mother-in-law's farm, he said he would talk to the owner, implying disrespect toward his sister-in-law, which enraged her and led her to fabricate the case against him.

He denied sleeping in the same house as the victim, stating that he was in his own place. His wife was in Isimani Ndolela and hospitalized at Lwanga dispensary on that day. The fight with his sister-in-law started when he demanded the money. His wife, who is epileptic, was unable to come. He

explained that he is from Njombe and a member of the Bena tribe, while his wife is from the Kinga tribe. He came to Isimani to work for his uncle and married his wife without knowing she was epileptic. She also uses medication for HIV/AIDS. Finally, the Appellant noted that he had been in jail since 2020 and prayed to be set free to rejoin his family.

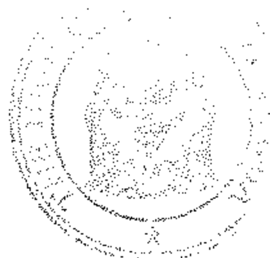
I have dispassionately considered the rival submissions in the light of the grounds of appeal. I will not detain myself in disposing of the entire appeal. This is because, the trial court recorded the evidence of PW3, a minor with signs of autism, without oath and still believed it without corroboration. While Section 127(1) of the Evidence Act allows for some flexibility, it is crucial for the court to provide clear and compelling reasons for such a decision. The lack of a proper explanation or a clear assessment undermines the credibility of the witness's testimony and violates the procedural requirements intended to ensure fair and reliable evidence.

I should emphasize that had the learned trial Magistrate properly directed himself, he should have, after making a finding that the victim was autistic, ordered that the appellant be charged with defilement of idiots or imbeciles c/s 137 of the Penal Code Cap 16 RE 2019. If in his opinion the

victim was autistic but not fit into the bracket of idiots and imbeciles, he should have stated so in his evaluation of evidence.

In the upshot, I allow the appeal. I hereby quash conviction and set aside the sentence. I order that the Appellant **JUMA MGAYA** be released from prison forthwith unless he is being withheld for any other lawful purpose.

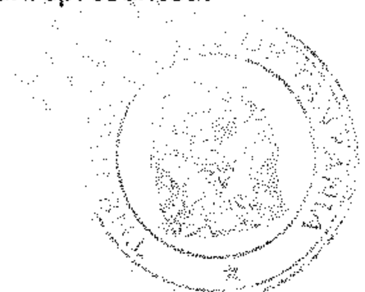
It is so ordered.



E.I. LALTAIKA
JUDGE
28.06.2024

Court

This judgement is delivered under my hand and the seal of this court this 28th day of June 2024 in the presence Mr. Sauli Makori, learned State Attorney for the Respondent and the Appellant who has appeared in person, unrepresented.



E.I. LALTAIKA
JUDGE
28.06.2024

Court

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

E.I. LALTAIKA
JUDGE
28.06.2024

HIGH COURT OF TANZANIA - IRINGA