

TANZANIA / JUDGMENT

arnold exaud mlay vs republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IRINGA SUB REGISTRY) AT
IRINGA DC CRIMINAL APPEAL NO. 55 OF 2022 (Original Criminal Case No. 16/2020 of the District
Court of Iringa before Hon. E.A. Nsangaiufu, SRM) ARNOLD EXAUD MLAY
APPELLANT VERSUS REPUBLIC RESPONDENT

JUDGMENT

1/h May & 31st July, 2023 I.C MUGETA, J: The appellant was convicted of unnatural offence contrary to section 154(l)(a) of the Penal Code, [Cap. 16 R.E 2002]. He was sentenced to life imprisonment. It was alleged that in the month which was not mentioned charge sheet in 2019 at Semtema 'A' area within the region of Iringa, the appellant had had carnal knowledge of the victim, a boy aged 10 years against the order of nature. He is challenging the conviction and life imprisonment sentence imposed on him based on eleven grounds which can be grouped into the following grounds, namely: Page 1 of 11

1. The charge was not proved beyond reasonable doubt.
2. The appellant's defence was not considered. The appellant appeared in person and unrepresented whereas Hope Masambo, Herbert Ishengoma and Daniel Lyatuu, learned State Attorneys appeared for the Republic. On the 1st ground, the appellant contended that the charge was not proved based on the following complaints. One, the charge sheet does not show the date when the incident occurred and it lacked essential ingredients of the offence. That, this disabled him to prepare his defence properly. Two, the victims (PW3) and PW4 in their evidence did not show that they named him as the culprit immediately and that they denied being sodomized by the appellant. He argued that delays in naming a culprit at an early opportunity creates doubts in the victim's evidence. Three, there are contradictions in the prosecution evidence. He pointed out those contradictions in the testimony of PW3 and PW4. That whereas PW3 said that he was sodomized together with PW4 in 2019, PW4 testified that sodomy started in 2018. Further that, PW3 did not state how many times they were sodomized but the trial Senior Resident Magistrate in her Page 2 of 11 judgment stated that PW3 was sodomized more than 10 times. Another contradiction is that PW3 testified that whenever the appellant finished sodomizing them, he ordered PW3 and PW4 to

sodomize each other a fact which was not stated by PW4. He argued further that the evidence of the medical doctor (PW5) contradicted the other prosecution witnesses as she stated that the victim had been sodomized a week ago before her examination and that he was sodomized once only. To the contrary, PW3 testified that he did not remember the dates when the incident occurred and that himself together with PW4 were sodomized frequently from 2018 to 2019 last sodomy was in 2020. This cannot be true because the appellant has been in custody since 15/12/2019. Four, that PW3 did not promise to speak the truth and not lies as required by section 127(2) of the Evidence Act [Cap. 6 R.E 2022] he only promised to speak the truth and feared nothing. Five, PW1 and PW2's evidence was hearsay as they did not witness the doctor examining the victim. That PW2 only testified that she was told by the police that the victim had been sodomized. Six, the evidence of the victim did not prove the offence. This is because the victim did not testify how the penis was inserted in his anus, he only stated that the appellant did bad things to his Page 3 of 11 anus. This is not sufficient to prove the offence. Seven, the delay in arraigning the appellant as he was arrested on 15/12/2019 but taken to court on 11/2/2020 without any explanation for the delay. That this violated section 33 of the Criminal Procedure Act [Cap. 20 R.E 2022] which requires an accused to be arraigned in court within 24 hours. Eighth, that the age of the victim was not proved by the prosecution as in the charge sheet it is said to be 10 years while PW3 stated that he is 11 years old. Nine, that the investigator of the case was not summoned to testify in court. In the second ground, the appellant argued that his defence which pointed out the weaknesses in the prosecution case was not considered as he had explained the weaknesses in the prosecution case. Ms. Hope Masambo opposed the appeal. On the 1st complaint that the date and time wasn't mentioned in the charge sheet, she argued that the non-mentioning of a specific date did not prejudice the appellant as the year, name of the victim and the ingredients of the offence are indicated. To buttress her submission, she cited the case of Halfan Rajabu Mohamed v. Republic, Criminal Appeal No. 281 of 2020, Court of Appeal Page 4 of 11

- Dar es Salaam (unreported) which held that not disclosing the date of the incident is not fatal. The case further held that penetration in the anus, however, slight is sufficient proof of the offence completeness. Regarding the complaint that the victim delayed in naming the appellant, the learned State Attorney submitted that PW4 mentioned the appellant as the one who sodomized them. PW2 also testified that the victim upon arriving home, told her that Big had sodomized him. Therefore, the victim named the appellant immediately when he was asked. On the complaint that the victim testified that he was last sodomized in 2020, she argued that this was a minor discrepancy due to normal memory loss and does not go to the root of the case. To support her argument, she cited the case of Alex Ndege v. Republic, Criminal Appeal No. 207/2018, Court of Appeal - Iringa (unreported) where the Court held that normal discrepancies are those due to normal memory loss. On the complaint regarding contradictions in the prosecution evidence, the learned State Attorney submitted that it was PW2 who testified that he was sodomized 9 times. She conceded that the trial magistrate, erred to hold that the victim was sodomized 10 times. On that Page 5 of 11 ' J

account she prayed this court to revisit the evidence on record and make its own findings. She submitted further that PW3's promise to speak the truth without fear does not vitiate his evidence because the law requires the witness of tender age to promise to speak the truth. Regarding the fifth complaint that PW2 did not enter the examination room, thus, her evidence was hearsay, the learned State Attorney submitted that her failure to enter the examination room does not exonerate the appellant from criminal liability. In her view, as long as the victim testified that he was sodomized, PW2's evidence is mere corroborative. On the sixth complaint that the offence was not proved as the victim did not testify on the manner the offence was committed, Ms. Masambu submitted that the victim stated clearly how the appellant lured him into his room and offered his phone and covered their mouths to suppress the voice as they were yelling and threatened to kill them. She argued that the offence was proved beyond reasonable doubt as the victim the best in sexual offences is that of the victim who in this case is credible. To support her contention that in sexual offence the best evidence is that of the Page 6 of 11 victim, she cited the case of Selemani Makumba v. Republic [2006] TLR 379. The learned State Attorney conceded on the complaint in the second ground that, indeed, the appellant's defence was not considered. However, she urged this court, being the first appellate court, to revisit the whole evidence including the appellant's defence and pass a judgment. Besides the many complaints raised by the appellant, I shall consider just one issue, whether the offence was proved as it is sufficient to dispose of this appeal. The defence of the appellant is that the case is a fabrication on account of having affairs with married women including the wife of PW1, the mother of the victim. The only evidence of sodomy comes from the victim. He testified on how the appellant sodomized him many times from 2018 - 2019. Fortunately, he was examined by a medical doctor (PW5) who filled in a PF3 which was admitted as exhibit Pl. Her finding reads: "No bruises seen around the anus there some penetration". Page 7 of 11 When she testified in court she said she found the anus of the victim open. She added that the anus which has been penetrated is usually open. It is my view that the testimony of the medical doctor in court as to the status of the victim's anus contradicts the contents of the PF3. If she did not find the anus bruised, she was duty bound to explain in the PF3 why she concluded that there was penetration. In my view, where there is no bruises or sperms in the vagina or anus, the only explanation on penetration hinges on the status of the hymen an the sphincter muscles respectively. However, in this case the medical doctor did not record on the PF3 the sphincter's condition. Therefore, her testimony in court that the victim's anus was open is unacceptable for not being reflected in the PF3. It is improbable that he could remember how the anus looked on 29/9/2022 when he testified while he forgot to record that fact in the PF3 on 20/12/2019 when he filled it in. Consequently, I reject his oral evidence that the anus was open because the content of the PF3 overrides his oral evidence in case of mismatch. This is the rule under section 100 of the Evidence Act [Cap. 6 R.E. 2022]. It is, therefore, not credible to support the evidence of the victim. Page 8 of 11 While I understand that in sexual offence cases the best evidence is that of the victim, the victim first must be credible. In this case the victims' credibility has been lowered by the uncontroverted evidence of the accused person in defence that he had extra marital affairs

with the mother of the victim, therefore, the father (PW1) has fabricated this case. This defence is highly probable because PW1 testified that it is his wife who broke to him the news about the victim being sodomized. However, his wife did not come in court to testify. Therefore, his evidence that the victim mentioned the appellant as the wrong doer is hearsay. PW1 did not say that the victim told him that he was sodomized by the appellant. He said the victim told him that the appellant sodomized Zelote. PW1 got the bad news that the victim has been sodomized on 19/12/2019. From that date to 23/9/2020 when the victim testified, there is no direct evidence on record as to when the victim named the appellant as the culprit. No investigator testified on how the case was reported, investigated and the arresting of the culprit. The evidence of the first mention of the appellant as the culprit is that of the victim when he testified in court on 23/9/2020. The foregoing notwithstanding, the victim never stated what prompted him to report that the appellant sodomized Page 9 of 11 him. He even did not explain how he told his mother who, allegedly, told her husband (PW1). The stated gaps when considered in light of the defence of the appellant that the case is fabricated on account of his extra marital affairs with the mother of the victim creates a reasonable doubt in the prosecution's case. The trial court considered the issue of fabricating the case and rejected it in this manner: "... allegation by the accused that the offence was fabricated cannot stand at all because if that was so done by the parents of the victim they could have fabricated another offence not like the present one of unnatural which could lower the reputation of their son". This holding has two problems. Firstly, it expresses the learned magistrate's views which is not supported by facts of the case. In my review of the record, I have not found any fact upon which it can be concluded that PW1 could not use the victim to revenge against the appellant for having love affairs with his wife. Secondly, it just refers to but does not consider the defence raised. It is always important to consider the defence against the relevant evidence of the prosecution and decide if Page 10 of 11 it raises reasonable doubts in the prosecution's case. Failure to consider the defence case vitiate the judgment. For the foregoing, I would have declared the trial court's judgment a nullity. However, this being a first appellate, I have re-assessed the evidence as shown above and found that the defence raises a reasonable doubt in the prosecution's case. On this account, I hold that the charge was not proved. The trial court erred to convict the appellant. I, consequently, allow the appeal. The conviction is quashed and the sentence is set aside. The appellant should be released from custody unless otherwise lawfully held for another offence. ■ I.C. MUGETA 11Jr ■ V * ■v h JUDGE 31/07/2023 Court: Judgment delivered in the presence of the appellant in person and Herbert Ishengoma, learned State Attorney for the respondent. Sgd. I.C. MUGETA JUDGE 31/07/2023 Page 11 of 11

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