

TANZANIA / JUDGMENT

DICKSON ISACK KIMARO V

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB REGISTRY AT
MOSHI CRIMINAL APPEAL NO. 17978 OF 2024 (Originating from Criminal Case No. 119 of 2021 of
Hai District Court) DICKSON ISACK KIMARO APPELLANT VERSUS
REPUBLIC RESPONDENT

JUDGMENT

10/10/2024 & 05/11/2024 SIMFUKWE, J. The appellant Dickson Isack Kimaro was arraigned before the District Court of Hai (trial court) charged with unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap 16 R.E 2022. It was alleged before the trial court that on 21st day of June 2021 at Roo village within Hai District in Kilimanjaro Region, the appellant had carnal knowledge of one KSL a boy aged 09 years against the order of nature. 1 Before the trial court the mother of the victim Lightness Swai (PW1) narrated among other things that on a material day in the morning hours she left money for tuition fee for the victim. In the afternoon, she made a phone call to the teacher asking whether her child had attended to school. The teacher told PW1 that she had not seen him. When she went back home PW1 found her children asleep. Next day, she went to wake up the victim and asked him why he did not go to the tuition, the victim disclosed the reason. He told her that he went to the appellant's house but he did not tell her that he was sodomised. However, after slapping him, the victim revealed that the appellant took him to his room and sodomised him. PW1 examined her child on his anal and found that it was not normal. She called PW2 and other relatives and narrated the whole incident to them. Then, PW1 reported the incident at the police station where they were issued with a PF3. They went to hospital where the victim was examined by PW4 Dr. Angelista Shirima. PW4 stated that the victim was penetrated by a blunt object which caused bruises on the anal of the victim. PW3 the victim testified that he met the appellant while on his way to his friends at bucha la mbuyuni area. The appellant required the victim to go with him to his house to play games on his mobile phone. The victim 2 agreed and went to the house of the appellant. Inside the room of the appellant, the appellant undressed the victim, took him on top of his bed and sodomised him. The victim felt pain but he was warned not to disclose the tragedy to anyone. Then, the victim asked the appellant to go for a short call, when he went outside, he run away. In his defence before the trial court, the appellant denied to had committed the offence. He alleged that on the material day he was supervising casual labourers who were working at their farm. That, he spent the whole day there and never left. His defence of alibi was corroborated with DW2 and DW3.

The trial court found the appellant guilty of the offence charged. He was convicted in absentia and sentenced to serve life imprisonment. The appellant was dissatisfied with the conviction and sentence. He filed the instant appeal on five grounds:

1. That, the learned trial Magistrate grossly erred both in law and fact in failing to note that, there are variance between the charge and the evidence on record.
2. That, the learned trial Magistrate grossly erred both in law and fact in relying upon the evidence of PW3 (the victim) to convict the appellant but failed to note that the said evidence did not fully 3 adhere to the mandatory requirements of section 127(2) of the Evidence Act, Cap 6 R.E 2019 now 2022.
3. That, the learned trial Magistrate grossly erred both in law and fact in using weak, tenuous, contradictory, inconsistent, incredible and wholly unreliable prosecution evidence as a basis of the Appellant's conviction.
4. That, the learned trial Magistrate grossly erred both in law and fact by being adamant that, the strong, unchallenged and well supported defence evidence did not raise reasonable doubt on the prosecution case.
5. That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubts against the appellant and to the required standard by the law. The appeal was ordered to be argued by way of written submissions. The appellant had no representation while the respondent was represented by Mr. Innocent Ng'asi, learned State Attorney. On the first ground of appeal, the appellant alluded that the charge sheet indicates "Roo Village" as the scene of crime. However, when the prosecution witnesses were paraded to support the charge sheet, none of 4 them mentioned "Roo village" as the location of the scene of the alleged crime. The appellant was of the view that, when the prosecution learned about the variation in the location of the scene of crime, ought to have enjoyed their right vested in law by invoking section 234 (1) of the Criminal Procedure Act (CPA) for moving the court to do necessary amendments. It was clarified that PW1 testified that she lives at Mudio area in Massama village. PW2 said that he lives at Massama village, while PW3 testified that he went to Kizim to brother Dickson. Thus, all the places mentioned by the noted prosecution witnesses varied with the location mentioned in the charge sheet. Therefore, it cannot be said that the charge was fully proved to the required standard. The appellant cited the case of John Julius Martin and Another vs The Republic, Criminal Appeal No. 42 of 2020, CAT, at page 12, where it was held that: "Legally, where a place of commission of the offence is mentioned in the charge, evidence must be led to prove that indeed the Appellant committed the offence at that place." On the way forward, the appellant subscribed to the case of Godfrey Simon and Another vs The Republic, Criminal Appeal No. 296 of 5 2018 in which the Court of Appeal quoted its earlier decision in Bainths and Another vs The Republic, which held that: ".....Where there is a variation in the place where the alleged armed robbery took place then the charge must be amended forthwith. If no amendment is

effected the charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right, short of that a failure of justice will occur.” The appellant cited another recent decision in *Salim Abdallah Maganga vs The Republic*, Criminal Appeal No. 285 of 2020 (2nd October

2023) at page 6 the Court of Appeal of Tanzania held that: “Still on the same point, the charge asserts that the offence was committed at a place known as Uwanja wa Ndege. Quite apart, in her evidence, PW1 told the trial court that the offence was committed at Kichochoroni. She was further clear in her evidence that she could not establish where such kichochoro was as she was a stranger in the town. In effect therefore, the piece of evidence proving an incident which occurred at a place called “Kichochoro.” The place of commission of the offence being crucial in establishing the offence we agree with the learned principal state attorney that, 6 the variance in that respect between the charge and evidence renders the charge not proved beyond reasonable doubt.” It was the opinion of the appellant that the circumstances of the cited cases are very similar to the case at hand. He urged this court to amplify the findings in the above cited cases in resolving the noted shortfall in this case. On the second ground of appeal; the appellant submitted that evidence of the victim (PW3) was taken in contravention of section 127 (2) of the Evidence Act. He referred at page 11 of the trial court typed proceedings. It was explained that it is settled that reception of evidence of a child of tender age is now governed by the cited section of law. He said that the Court of Appeal has already laid the interpretation of section 127 (2) Tanzania Evidence Act that a child witness before giving evidence a trial court should ask few pertinent questions so as to determine whether or not the child understands the nature of an oath. Referring to the case at hand, the appellant submitted that there are no questions which were asked to the child witness. Second, the answers which seem to come from the child witness do not fall within the mandatory requirements of the interpretation of section 127 (2) of T.E.A. Therefore, it cannot be said with certainty that the provisions of the above section of law were met. On the third ground of appeal; the appellant asserted that the trial Magistrate convicted him on weak, tenuous, incredible and very suspicious evidence from prosecution witnesses. He faulted evidence of PW1 and PW3. He was of the view that PW3 was forced to speak what PW1 wanted to hear. That PW1 said that she asked the victim what had been done to him by the said “Brother Dickson/Mandege” and the child said that nothing was done to him. However, PW1 slapped the child and forced him to speak, then the child spoke what PW1 wanted to hear from the child (PW3). The appellant explained further that the method used by PW1 to extract the information from PW3 on what is alleged to have befallen him (PW3) cannot be said with assurance that what was alleged to have been done to PW3 was real done by the appellant herein. PW1 testified that the appellant had bad image in the village, as he had other accusations of sodomy cases. Although the prosecution said that they had no previous record against the appellant. The appellant buttressed his submission by citing the case of *Abiola Mohamed @ Simba v. Republic*, Criminal 8 Appeal No. 291 of 2017 (unreported) in which the Court of Appeal held that: “However, we wish to emphasize as we did in the case of *Mohamed Said* (supra)

the need to subject the evidence of the victim to scrutiny in order for courts to be satisfied that what they testified is nothing but the truth. The testimony of the victim of sexual offence should not be taken as a gospel truth but has to pass the test of truthfulness. It is only through this litmus test that courts will ensure that only deserving offenders are kept behind bars and the innocent are set free.... We think it is momentous that we should remark in passing that there is a dire need to exercise extra care in handling cases of sexual offences as we earlier on cautioned in the case of Mohamed Said

- v. Republic, Criminal Appeal No. 145 of 2017 (unreported) in which faced with akin situation we quoted with approval the cautionary statement of Lord Chief Justice Mathew Hale made in the 17th century which is still very relevant during our times. The Lord Chief Justice stated in *People vs Benson*, 6 Cal. 221 (1856), that Rape; 9 “Is an accusation easily to be made and hard to be proved and harder to be defended by the party accused.” Further reference was made to the case of *Peter Joseph Kimath v. Republic*, Criminal Appeal No. 373 of 2020, in which Court of Appeal held that: “However, for better ends of justice we wish to add that, for a trial Judge or Magistrate to base a conviction on the victim’s evidence the same must be assessed to find whether the evidence is the most credible and no doubts from it. That means, the testimony of the victim should not be taken as Biblical versions without considering other important aspects such as the credibility and reliability of the victim’s testimony.” From the cited authorities, it was contended that the trial Magistrate never put the evidence of the victim in a litmus test to see and determine whether the child victim was telling the truth and nothing but the truth. That, if that was done, the trial magistrate could have detected that mentioning the appellant as the ravisher of the child victim came from coheres used by PW1 to force PW3 to mention the appellant herein. In his final analysis, the appellant prayed this court to find and hold that the prosecution failed to discharge the duty vested upon them by law of 10 proving the charged offence beyond any reasonable doubt against the appellant and to the required standard by the law. Hence, find merit in the appeal, allow it, quash the conviction, set aside the sentence and set the appellant at liberty. In his reply, Mr. Innocent Ng’asi learned State Attorney supported the conviction and sentence meted against the appellant by the trial court. On the first ground of appeal, Mr. Innocent replied that the appellant is looking for an escaping room for his lawful act which he committed to the little boy. He was of the view that there is no variance found in the charge from the evidence adduced by the prosecution witnesses. It was stated that no prosecution witness said that the offence was committed at Roo village as they all mentioned Masama village. The victim explained at page 11 to 12 how he came across the accused and then the accused took him to his house where he penetrated the victim against the order of nature. That, from the accused’s defence at page 21 of the trial court proceedings, the accused answered that he lives at Masama Roo. The learned State Attorney submitted further that the fact that the appellant agreed in his defence to be a resident of Masama Roo and he knew the victim corroborates prosecution evidence that he knew him and lived there. It was elaborated that when accused gives evidence which 11 join hand prosecution evidence, such evidence should be taken as corroborative evidence against him.

Mr. Innocent said that the stance was illustrated in the case of Galus Kitaya v. Republic, Criminal Appeal No. 196 of 2015, CAT at Mbeya [2016] (unreported), in which the Court quoted with approval the “ratio decidendi” from the case of Shabani Daudi v. Republic, Criminal Appeal No. 28 of 2001 (unreported) and stated that: “The credibility of a witness can also be determined in other two ways, that is, one, “By assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses including the accused....” On the second ground of appeal which concerns non-compliance with the provision of section 127(2) of the Evidence Act, Mr. Innocent replied that the trial Magistrate complied with the said section. He said that at page 11 PW3 stated that: “I promise to tell the truth in court and not to tell lies.” Apart from that, the learned State Attorney contended that section 127(2) of the Evidence Act, Cap 6 R.E 2022 was amended by section 32 of the Legal Sector Laws (Miscellaneous Amendments) Act, 2023 which states: 12 “The principal Act is amended in section 127, by-

- (a) Adding immediately after subsection (6) the following: “(7) Notwithstanding any other law to the contrary, failure by a child of tender age to meet the provisions of subsection (20 shall not render the evidence of such child inadmissible.” The above cited provision was said to had been cemented in the recent case of Abdul Akwilina Mramba & Others vs Republic (Criminal Appeal No. 342 of 2021) [2024] TZCA 704 (9 August 2024) at page 19 and 20 of the judgment. In reply to the third, fourth and fifth grounds of appeal which pertains to failure of the prosecution side to prove their case beyond reasonable doubts; Mr. Innocent submitted that to prove unnatural offence as per section 154(1)(a) of the Penal Code (supra), the prosecution had to prove the elements which constitute the said offence. He stated that in the case of Joel Ngailo v. Republic (Criminal Appeal 344 of 2017

[2019] TZCA 314 (29 August 2019) at page 8 the elements of unnatural offence were outlined as follows: “Penetration, however slight into the anus, with or without consent; is an essential ingredient of unnatural offence under section 154 13

- (1) (a) of the Penal Code, proof of penetration is the main ingredient that makes this offence complete.” In the instant case, Mr. Innocent said that in proving the offence charged, the prosecution called four witnesses. PW1 the mother of the victim testified on the age of her son and how she came to know the incidence and later took his son to the police station. Then, the victim was taken to hospital for medical examination. PW3, the victim was able to identify the culprit and stated the shameful act done to him by the appellant. It was stressed that in sexual offences the best/true evidence comes from the victim as it was held in the case of Selemani Makumba v. Republic

[2006] TLR 379. Also, the learned State Attorney cited the case of Mohamed Said vs Republic (Criminal Appeal No. 145 of 2017)

- [2019] TZCA 252 (23 August 2019) at page 14 of the judgment. Mr. Innocent continued to emphasize that evidence of the two key witnesses was corroborated with the evidence adduced by PW2 a friend to the mother of the victim. That, PW2 stated that she received a phone call from PW1 crying that her son was sodomized by the appellant. PW2 went to PW1's homestead and examined the private part of the victim and observed that it was not normal. Moreover, PW4 a medical doctor said that the victim had bruises and external sphincters were loose. The doctor 14 stated further that the bruises were a result of penetration by a blunt object. PW4 tendered a PF3 report which was admitted as exhibit P1. From the above assertions, the learned State Attorney was of the opinion that the offence was proved beyond reasonable doubts. He prayed that the appeal be dismissed, conviction and sentence of the trial court be upheld. In his rejoinder, the appellant reiterated his submission in chief. He added that the respondent is supporting the first ground of appeal by stating that all prosecution witnesses mentioned Masama village. That, since none of the prosecution witnesses mentioned the place mentioned in the charge sheet, hence, the charge which is the foundation of the trial remained unproved. I have examined the trial court's record, the grounds of appeal and submissions of both parties. The issue is whether the charges against the appellant was proved beyond reasonable doubts. On the first ground of appeal, that the charge sheet was at variance with the evidence of prosecution witnesses; the appellant submitted inter alia that whereas the charge indicates that the incident occurred at Roo village, prosecution witnesses testified that the offence was committed at Masama village. The learned State Attorney was of the view that there 15 was no variance between the charge sheet and evidence of PW1. However, he impliedly conceded that prosecution witnesses mentioned Masama village and not Roo village. Semantically speaking, Roo village and Masama village are two different places. It is the position of the law that where there is variance between the charge sheet and prosecution evidence, the charge will be rendered unproved. The same has been restated in a plethora of authorities. In the case of John Leon Kimario v. R (Criminal Appeal No. 105 of
- 2021) TZCA [2024] (06 June 2024) at page 12-14 it was held that: ".....in this case we do not think the charge was proved, for there is a clear variance between the two; the charge and the evidence." In the instant case, I concur with the appellant that the charge sheet was at variance with evidence of all prosecution witnesses in respect of the place of commission of offence. That discrepancy goes to the root of the case and shakes the prosecution case. The second ground of appeal faults the trial court for its failure to adhere to the mandatory requirement of section 127(2) of the Evidence Act. Mr. Innocent contested the ground by citing the recent amendment of the noted provision of the law and the case of Abdul Akwilina Mramba and Others v. R (supra) which echoed the amendment. Respectfully to 16 the appellant, I appreciate the authorities cited by the learned State Attorney. Non-compliance to section 127(2) of the Evidence Act, where there is strong evidence in support of the offence charged, can now be ignored safely. That is the current position of the law. On the third, fourth and fifth grounds of appeal, the appellant faulted the trial court for

using tenuous, contradictory, inconsistent, incredible and wholly unreliable prosecution evidence. In his submission in chief, he stated among other things that PW3 was not a credible and reliable witness. That, the victim stated what PW1 wanted him to state after slapping him. The learned State Attorney submitted that the prosecution managed to prove all the key ingredients of unnatural offence through two key witnesses (PW1 and PW3). Moreover, Mr. Innocent referred the general principle that in sexual offences the best evidence comes from the victim. I am aware of the principle referred by the learned State Attorney. However, in our case evidence of the victim leaves a lot to be desired, leave alone weaknesses of other prosecution witnesses. At page 12 of the proceedings, the victim stated among other things that when he told his mother that he went to the appellant, his mother asked him whether there was anything that Dickson (appellant) did to him. Even if the mother of the victim had not punished the victim, the way she asked 17 the victim raises reasonable doubt on how the incident came to light and whether the same was actually committed by the appellant. It is trite law that weak evidence cannot be corroborated. In this case, evidence of PW4 could not support weak evidence of PW1 and PW3. In addition, as already stated in the first ground of appeal, even the place of commission of the offence is uncertain. Hence, the offence charged was not proved beyond reasonable doubts. Consequently, I hereby allow this appeal. Conviction against the Appellant is quashed and the sentence of life imprisonment is set aside accordingly. The Appellant is ordered to be set at liberty immediately, unless held for other lawful reasons. Appeal allowed. Dated and delivered at Moshi this 5th day of November 2024. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 05/11/2024 18

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