

TANZANIA / JUDGMENT

george mlaki elihuruma vs republic

2022 tzhc 15233 16 december 2022

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TZHCDECIDED
16 December 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (SUMBAWANGA DISTRICT REGISTRY) AT SUMBAWANGA DC. CRIMINAL APPEAL NO. 83 OF 2022 (Originating from the decision of Miele District Court at Miele in Criminal Case No, 92 of 2022 before Hon. B.M. Ahmed - RM) GEORGE S/O MLAKI @ ELIHURUMA APPELLANT VERSUS REPUBLIC..... RESPONDENT 30/11/2022 & 16/12/2022

JUDGMENT

MWENEMPAZI, J: In the District Court of Miele at Miele the appellant was arraigned for committing unnatural offence Contrary to Section 154(1) (a) of the Penal Code, Cap 16 R.E 2019 whereby it was alleged that on the 7th day of November, 2021 at Majimoto Village within Miele District in Katavi Region, the accused (appellant herein) did unlawfully have carnal knowledge of one MWADAWA D/O GREGORY against the order of nature, a girl aged 20 years old. When the charge was read over to the accused, he pleaded not guilty, which plea was entered by the trial Court, A preliminary hearing was conducted and the accused (appellant herein) admitted only to persona! particulars of the accused as reflected in the charge sheet; the fact that on 7/11/2021 accused was at Mkuyuni Village; and the facts that he was arrested and taken to Court on 11/11/2021. Since the accused had distanced himself with the charges, the case had to go for trial. The prosecution called seven witnesses and the defence called only one witness, the defendant himself. At the conclusion the appellant was found guilty to the charge and convicted of the Unnatural Offence Contrary to Section 154(1) (a) of the penal Code, Cap 16 R.E 2019 and sentenced to serve imprisonment for a term of thirty (30) years in jail. The appellant is aggrieved with the conviction and sentence hence has appealed to this Court on the following grounds: -

1. That the trial Court erred in law and fact by conviction the appellant relying on exhibit Pl which was a PF3 and evidence of PW7 a medical doctor which does not show prove penetration.
2. That the trial Court erred in law and in fact by conviction the appellant relying on uncorroborated evidence of PW2, who is a person of unsound mind who have no ability to remember incident.

3. That, the trial Court erred at law and fact by convicting the appellant on the basis of a caution statement which was unlawfully procured. 2
4. That the trial Court erred at law and fact by disregarding the Evidence of the appellant that he was not familiar with the victim before the incident.
5. That the trial Court erred in fact and law to convict the accused on the case which was not proved beyond reasonable doubt. The appellant prays that this Court enters judgment in his favour, allow the appeal, quash conviction, set aside the sentence and release him. At hearing the appellant was unrepressed and the republic was being represented by Mr. John Kabengula, Learned State Attorney. The appellant in his submission prayed that the grounds of appeal be considered and appeal be allowed, so that he is set free. Mr. John Kabengula, Learned State Attorney in his reply submitted that they are opposing the appeal, thus support conviction and sentence by the trial Court. The Counsel submitted that in the trial Court the appellant was charged for committing Unnatural Offence Contrary to Section 154(1) (a) of the Penal Code, Cap 16 R.E 2019. The Counsel for the Respondent submitted that in convicting the appellant, the Court did not depend on the evidence of PF3 alone. But also the evidence as tendered by PW2 the victim. The victim testified how the appellant sex intercourse with the victim against the order of nature. When the doctor was testifying at page 27 of proceedings prayed to tender PF3. The appellant did not object. Even the questions raised at cross examination, he did not ask any question to oppose to the evidence tendered. On the second ground of appeal, he submitted that the evidence by PW2 was uncorroborated. Apart from PW2 there are other witnesses who testified on how they discovered and how the victim went to point at the appellant. In the case of Seleman Mkumba Vs. Republic [2006] TLR 373 it was observed that is sexual offences the best evidence comes from the victim. The other witnesses are PW1 who testified how the victim showed the house and identified the appellant. During cross examination the testimony of the prosecution was not shaken; the Counsel opined that the trial Court was right to convict the appellant basing on the evidence of PW2. On the third ground of appeal, the Counsel submitted that the record does not support the complaint because the same has never been tendered. 4 The trial Court did not rely oh the evidence of caution statement. I do agree to this point as the judgment confirms the same. On the fourth grounds of appeal, that the appellant's submission that he is not familiar with the victim was disregarded, the Counsel submitted that the victim PW2 explained how she met the appellant. The victim was able to identify and pointed at him when PW1 and PW3 went at his residence. The Counsel prayed that the appeal be dismissed. I have had time to review the record of the trial Court and or go through the evidence by the prosecution. PW1 Hadija d/o Salum Sadi is the mother of the victim in this case. She is the one who, first noted that the behavior of the victim has changed and took trouble to interview her. That is when she was told that 'Baba - baba' has done nasty act to her. He had sex with the victim against the order of nature. On the date 7/11/2021 she could not do anything as most people were at the auction (mnada). In her testimony she says the next day she left with the victim whereby they went to the residence of suspect and she showed the house and the room, the victim was sodomized. She came to

realize that the appellant is the perpetrator. Though she did not testify how she knew of the fact, she testified that on the date 7/11/2021 after looking for assistance without any success: - "Z discovered that she was penetrated from 13:00 hours until 17:30 hours". PW1 is the one who sought the intervention or assistance of the local leader PW3 ANISETH S/O CASTORY. According to the evidence on record, PW2 is the victim and the only eye witness. She is assessed by the trial magistrate as follows: "Witness is of unsound mind, but the witness is able to give rational answers, and the witness understands the questions put to her, as such subject to 127(5) of Evidence Act, Cap 6 R. E 2019, the witness is competent to testify" The testimony is recorded showing that the victim knew the assailant as 'Mangi' by name. When her mother was questioning her she told her "baba - baba" she showed by signs what had been done to her and interpreted by PW1 that she was saying 'baba - baba has sodomized her. The name 'Mangi' was not mentioned at the first day 17/11/2021. The victim on the day was seen her rectum out the anus. In fact, the rectal muscles had protruded outside showing, according to witnesses particularly PW1, that she has been sodomized. In the testimony of PW2 she said: "Islept, my backside, I was wearing pants, 'Mangi' took off my pants. 'Mangi' took off his clothes, he put his penis to me (PW2 touches her buttocks)" He continued testifying that: "I was sick, 'nyuma huku' mangi gave me Tshs. 300/= I went to buy chewing gum (jojo). It was Mangi who did it to me, this one (PW2) (pointing to accused person before the Court)" The most important part after the background set above in the evidence by PW2 is the cross examination. For clarity I will quote the relevant part of the record as follows: "Cross examination by accused

- It is you
- It is the teacher who told me to come to your home.
- It is you who did it to me
- It is my friend who did it to me.
- It is you alone ' 7
- I felt pain
- Only two of us.
- I saw you today..... Generally, the evidence or testimony is vague. It is not clear if it pointing to the accused or someone else also is being implicated who is recognized as a "Friend". When it comes to the protruding muscle tissues from the anal orifice, the testimony of PW7 the doctor who treated the victim is relevant. The same is recorded to read as follows; I quote: - "Z had difficulty communicating with her which made me realise that she was of unsound mind. Her mother informed me that she was born that way. Her appearance suggested that she was 20 years old. Then, I proceeded with diagnosis on her private parts. I started with the vagina, there was no problem, she had no bruises and her hymen was intact. Then I checked her anus, I saw her rectum came out, it was out of the anus. I could not see any sign which could support the complaints that she was penetrated, but I did not

see signs perhaps because she was 8 lately brought at the health centre, and I was informed that she took bath and changed her clothes. For the Rectum to come out of anus, It can be caused by diseases in the large intestine diarrhea, constipation or even to be penetrated by a blunt object, Including penis. The signs I expected was (sic) like sperms, bruises, and disturbance of sphincter, I could not see such signs. I asked her mother in relation to other diseases which might have caused the rectum to come out, but she informed me that she never noticed any disease from her daughter. I could not see any bruises, the rectum was out for almost a day, it was not easy to see the bruises. The sphincter was not loose. I had to put the rectum back to its position". With the evidence of the doctor when read together with the testimony of other witnesses especially PW2 and concludes that we have no specific point or person to blame. In my opinion, the available evidence, is mostly hearsay; that of PW2 is conflicting and or contradicting. However, PW7'S evidence is conclusive 9 , that there is no definitive answer that it is the appellant who did the act which caused the rectum to come out or it is another person or disease. Worse enough the victim cannot express herself properly by virtue of being of unsound mind. Under the circumstances, I find that there are a lot of doubts which the available evidence has not resolved and the same must be resolved in favour of the appellant. The appeal is therefore meritorious and I therefore allow it. The judgment and conviction by the trial Court are quashed, sentence set aside, the appellant should immediately be released from prison unless he is lawfully being held for another reason. It is ordered accordingly. Dated at Sumbawanga this 16th December, 2022. T.M. MWENEMPAZI JUDGE 10

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Prepared on 13 October 2026 · Esheria