

TANZANIA / JUDGMENT

Juma Mohamed Mchowera vs The Republic Criminal Appeal No16725 of 2024 2025 TZHC 515 24 February 2025

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB-REGISTRY AT
DAR ES SALAAM CRIMINAL APPEAL NO. 16725 OF 2024 (C/f Criminal case No.23 of 2023 in the
District Court of Kigamboni at Kigamboni) JUMA MOHAMED
MCHOWERAAPPELLANT VERSUS THE
REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: 25-11-2024 Date of Judgment : 24-2-2025 B.K.PHILLIP,J The appellant herein was arraigned before the District Court of Kigamboni at Kigamboni for committing an unnatural offence to a boy aged fourteen years old (14), contrary to Section 154 (1) (a) and (2) of the Penal Code (CAP. 16 R.E. 2022). He was convicted and sentenced to life imprisonment. Aggrieved, the appellant lodged this appeal on the grounds reproduced verbatim hereunder:

- i) That the learned trial Magistrate erred in law and in fact in entertaining 1 a matter with the defective charge sheet. ii) That the learned trial Magistrate erred in law and in fact in her failure to analyze the prosecution evidence, whereby the prosecution failed to prove the case in the required standard, proving beyond reasonable doubt. iii) That the learned trial Magistrate erred in law and in fact in relying on hearsay evidences in convicting the accused. iv) That the learned trial Magistrate erred in law and in fact in her failure to note that the testimony of PW 1 does not fit to the dictate of the provision of Section 127(7) of the Tanzania Evidence Act (Cap 6 R.E 2019) as a result came up with unjust conclusion. v) That the trial magistrate erred in law and in fact by convicting the appellant in a case which was poorly investigated whereby the prosecution failed to call a police officer who issued a PF3 and a police investigator to testify on the date the complaint was lodged to the police and the result of the investigation. This appeal was disposed of by written submissions. The learned Advocate Muluge Karoli Fabian and learned State Attorney Winifrida Ouko appeared for the appellant and respondent, respectively. Briefly, the prosecution case was that on an unknown date in February 2022 2 in Magogoni area within Kigamboni District in Dar es Salaam Region, the appellant did have carnal knowledge against the order of nature one a

boy aged fourteen (14) years of age (Hereinafter to be referred to as “BB”). In proving the case against the appellant, the learned State Attorney paraded four witnesses, namely “BB” (PW1), Issa Sijal Issa (PW2), Mickael Haidan Ndunguru (PW3), and Nyamizi John Ngusa (PW4). On the other hand, two witnesses testified for the defence, to wit; The appellant (DW1) and Yusufu Mohamed Ahmed (DW2). Back to the appeal in hand, submitting the 1st ground of appeal, Mr. Muluge argued that the charge sheet does not indicate the date the alleged offence was committed in contravention of sections 132 and 135 (a) (ii) of the Criminal Procedure Act (“CPA”) that governs mode of charging of offences. He contended that a charge is supposed to contain essential elements of the offence and the provisions of the law to enable the accused person to understand the case leveled against him and prepare for his defence. He believed that the words “ on unknown date of February 2022” in the charge sheet led to the accused's failure to comprehend the charge sheet well, and consequently, he was unable to prepare himself well enough to defend the case. Mr. Muluge cited the case of Mohamed Koningo Vs Republic, (3

1980) TLR.279 to cement his arguments. Moreover, Mr. Muluge argued that the defects he pointed out in the charge sheet could not be cured by section 338 (1) of the CPA. With regard to the 2nd ground of appeal, Mr. Muluge argued that the prosecution failed to prove the case to the standard required by law. He contended that the evidence presented by the prosecution witness contradicted each other. Expounding on this point, Mr. Muluge submitted that PW1 (“BB”) told the court that what happened the first time the appellant sodomized him was that, he sent him to buy cigarettes. When he brought the cigarette to the appellant, he waited for the appellant outside the house so that he could hand over the cigarette to him. However, the appellant told him to bring him the cigarette in the house. He entered the appellant’s house, and the appellant pushed him into his room. He undressed and sodomized him. The following day, the appellant asked him to buy cooking oil, and when he brought the cooking oil to the appellant, he (the appellant) pushed him into his room through the rear door. Fortunately, his son entered the house through the front door, so the accused could not accomplish his mission. He released him. 4 Mr. Muluge contended that PW1’s testimony is contradictory to the testimony of PW2, who told the trial court that after being sodomized for the first time the following day, “BB” was sodomized again and, on that day, when “BB” went to take a shower, he (PW2) saw sperms on “BB’s underpants. He asked “BB” what happened to him, but “BB” did not tell him that he was sodomized by the appellant. Mr. Muluge insisted that there were contradictions between the testimony of PW1 and PW2, which are apparent on the face of the record. Had the trial Magistrate analyzed the evidence adduced by the prosecution properly, he would not have convicted the appellant because the prosecution failed to discharge its duties of proving the case beyond reasonable doubt as required in law. He cited the case of Jonas Nkinze Vs. Republic (1992) TLR 213 and Juma Idd Yohana @ Sita Vs. Republic, Criminal Appeal No. 48 of 2021 (unreported) to cement his arguments. Mr. Muluge pointed out that the accused is only required to raise reasonable doubts in the case against him. He cited the case of Idd Ismail Mohamed Vs. Republic, Criminal Appeal No. 135 of 2005, (unreported), to cement his

arguments. With regard to the 3rd ground of appeal, Mr. Muluge argued that the trial court erred in convicting the appellant, relying on the testimonies of PW2 5 and PW4 that were hearsays since in their testimonies, apart from the deposition to the effect that they took “BB” to the hospital, the rest of their testimonies were narrations of what they were told by “BB”, thus hearsays. He contended that hearsay evidence has no evidential value. To cement his arguments, he cited the case of Cristopher Kandidius @ Albino Vs Republic, Criminal Appeal No. 394 of 2015 (unreported). Further, Mr. Muluge argued that the testimony of PW3 proves that “BB” was sodomized. However, since he did not witness the appellant sodomizing “BB,” his testimony and Exhibit P1 (the PF 3) do not in any way prove the offence charged against the appellant beyond reasonable doubt. Thus, the same cannot be relied upon to convict the appellant. Regarding the fourth ground of appeal, Mr. Muluge argued that the only witness whose testimony remained to be considered by the court was PW1, but the same needed to be corroborated. He went on to submit that since “BB” was a minor, 14 years old, his testimony was required to comply with the provisions of section 127 (7) of the Tanzania Evidence Act (TEA), but it did not, since he was not a credible witness. PW1’s testimony leaves a number of questions unanswered, such as why, after being sodomized, “BB” kept quiet, did not tell anybody what happened to him, and did not say the 6 date he was sodomized. He insisted that PW1’s credibility is highly questionable. The law did not envisage that the victim’s testimony should always be accepted and believed without the victim’s credibility being tested and the court being satisfied that he/she is telling the truth. Mr. Muluge cited the case of Selemani Makumba Vs Republic (2006) TLR 379, Issa Reji Mafita Vs. The Republic, Criminal Appeal No. 337 B of 2020 (unreported), Said Hemed Vs Republic (1987) TLR 117 and Festo Mawata Vs Republic, Criminal Appeal No.299 of 2007 (unreported), to support his stance. Submitting for the 4th ground of appeal. Mr. Muluge argued that the case was poorly investigated, and the prosecution failed to bring in court the investigator of the case, who was a material witness because he issued the PF 3 and could have told the court the date the complaint against the appellant was lodged at the police station. Relying on the case of Azizi Abdallah Vs. Republic (1991) TLR 71, he maintained that failure to call material witnesses for no good reason is fatal to the case, and the court is obliged to take adverse reference against the prosecution. Further, referring this court to the testimony of DW2, Mr. Muluge argued that the appellant was staying with his family members. Therefore, it was not possible for the offense of sodomy to be committed at the appellant’s home, as alleged by PW1. Citing the case of John Makolobela, Kulwa Makolobela and Eric Juma @ Tanganyika Vs. Republic (2002), TLR 296, Mr. Muluge contended that an accused person is convicted on the strength of the prosecution case, not the weakness of his/her defence, thus even if the trial court found that the appellant’s defence was weak, it was supposed to acquit the appellant because the prosecution failed to prove their case to the standard required by the law. In rebuttal, starting with the 1st ground of appeal, the learned State Attorney argued that the charge sheet was not defective since it contained the statement of offence with the particulars of the offence sufficient to give reasonable information to the accused person on the nature of the charge, which was enough to enable the appellant to prepare his defence thus, he was

not prejudice in any way. She insisted that the prosecution complied with the provisions of sections 132 and 135 (a) (ii) of the CPA. With regard to the 2nd ground of appeal, the learned State Attorney argued that the trial magistrate analyzed the evidence adduced properly and made correct findings. She contended that there is no contradiction between PW1's and PW2's testimony, as alleged by Mr. Muluge because PW1 testified in court that the second time the appellant sodomized him was the day he sent him to buy cooking oil. When he brought the cooking oil, the appellant pushed him into the house and sodomized him. PW2 testified that on that very day, he saw PW1's underpants wet with sperm when PW1 left his underpants in their bedroom and went to take a shower. Upon coming back into the room after taking a shower, he asked him what had happened, and PW1 narrated to him how the appellant had sodomized him two times. The learned State Attorney referred this court to pages 23 and 24 of the proceedings to cement his arguments. Further, she pointed out that PW3's testimony was to the effect that he examined PW1 and found out that he was sodomized, as indicated in the PF3 (Exhibit P1). The testimony of PW1 was credible and deserves to be believed since there are no good reasons to discredit it. To cement her arguments, she cited the case of Goodluck Kyando Vs. Republic (2006) TLR 363 and argued that the testimony of PW1 was also corroborated with the testimony of PW4 (BB's mother), who reported the incident to the police and told the court that "BB" was 14 years old. The learned State Attorney maintained that PW3 and PW2 corroborated PW1's testimony, though it was not necessary under the law for the 9 testimony of PW1 to be corroborated with any other evidence. To cement her argument he cited the case of Habibu Mtila Vs Republic, Criminal Appeal No.416 of 2018 (unreported) in which the Court held that "It is now the position in sexual offence case, the only independent evidence of the offence including a child of a tender age, may be sufficient to prove penetration notwithstanding that such evidence is not corroborated" Moreover, relying on the case of Ramadhani Juma @ Samunga Vs The Republic, Criminal Appeal No. 86 of 2022 (unreported), the learned State Attorney, argued that to prove an offence under section 154 (1) of the Penal Code, (unnatural offence) the prosecution is required to prove penetration of the accused's/appellant's male organ in the anus of the victim and the best evidence is that a victim. The learned State Attorney was emphatic that the testimonies of PW1, PW2, PW3, and PW4 were coherent and credible. Thus, the prosecution proved beyond reasonable doubt that the appellant sodomized "BB." In response to Mr. Muluge's arguments with respect to the 3rd ground of appeal, the learned State Attorney submitted that the testimonies of PW2 and PW4 were not hearsays since they talked to the victim ("BB") 10 themselves. What they testified in court was not second-hand information. She pointed out that PW2 testified that he saw PW1's underpants wet with sperm and asked him what had happened. He testified on something he saw himself and information he received directly from "BB". The learned State Attorney argued that "BB" mother testified that "BB" was 14 years old, which was in her personal knowledge. Also, she is the one who reported the matter to the police herself. PW4 told the trial court what he heard from "BB" himself, not second-hand information. In short, the learned State Attorney maintained that none of the prosecution's evidence was hearsay. With regard to the 4th ground of appeal, the

learned State Attorney referred this court to section 127(6) of the Tanzania Evidence Act, (TEA) and contended that the evidence of a child of tender age does not need to be corroborated, if believed by the court can be used to convict an accused person. She went on to argue that PW1 testified in court that he was sodomized by the appellant, and after that, he threatened him that if he narrated what happened to him, he (the appellant) would frame a case against him. Consequently, PW1 did not report the incident immediately. “BB” described the structure of the appellant’s house that is, it has two 11 doors. A front and rear door. He told the trial court that he knew the appellant by face because he used to pass near his house while coming from the bus stand, though he did not know his name. The learned State Attorney was emphatic that the provisions of section 127 of the TEA were complied with because PW1 spoke the truth and was a truthful witness. She refuted Mr. Muluge’s arguments with respect to the 5th ground of the appeal. She contended that according to section 143 of the TEA, no minimum number of witnesses is required to prove a case. In this case, the prosecution brought in court four (4) witnesses, including the victim – “BB” (PW1), who was the material witness in proving the charge against the appellant. To cement her argument, she referred this court to the case of Wambura Marwa Wambura Vs. Republic, Criminal Appeal No.115 of 2019 (unreported). She contended that the investigator did not witness the commission of the offence. His testimony is only corroborative; thus, he was not a material witness. The proof of sexual offence comes from the victim. To cement her arguments, she cited the case of Juma Ramadhani @ Mtalika Vs. Republic, Criminal Appeal No. 80 of 2023 (unreported). She was of the view that material witnesses were summoned in court and the prosecution proved its case to the standard 12 required by the law. In conclusion, she prayed for the dismissal of this appeal in its entirety. In rejoinder, Mr. Muluge reiterated his submission in chief and added that the failure to indicate the exact day of the commission of the alleged offence is fatal as it denied the appellant the opportunity to utilize the available defence in criminal law, such as the defence of alibi. The failure to bring the investigator to court was fatal because he would have assisted the court in knowing the environment where the offence was committed. He insisted that PW3 did not witness the appellant committing the offence charged against the appellant. Hence, PW3’s testimony cannot be used to convict the appellant. Having analyzed the rival arguments raised by the learned Advocate Muluge and the learned State Attorney, let me proceed with determining the grounds of appeal. Starting with the first ground of appeal, I hasten to say that, the same has no merit since the charge was not defective. As correctly argued by the learned State Attorney, I have read the charge sheet. It states that the offence was committed in February 2022 and gives the particulars of the offence as required in sections 132 and 135(a) (ii) of the CPA in such a way that the appellant was capable of preparing his defence. The charge 13 sheet clearly states the type of the offence and where it was committed that is, the Magogoni area within Kigamboni District, and the name of the victim (“BB”). What is missing on the charge sheet is only the exact day on which the offence was allegedly committed, which is why the words “on an unknown date in February” appear in the charge sheet, but that is, not fatal since the month and year on which the prosecution alleges the offence was committed is

indicated in the charge sheet. I think it is also apposite to point out here that the case of Mohamed Koningo (supra) relied upon by Mr. Muluge in support of this argument is distinguishable from this case since it contains a different set of facts from the case in hand. In that case, the particulars of the case were not in line with the offence charged against the appellant, which is not the case in the appeal in hand. In this case, the charge shows that the appellant was charged with an unnatural offence, and the particulars state that he had carnal knowledge of a boy aged 14 against the order of nature. Mr. Muluge's concern that the appellant failed to prepare his defence properly and failed to raise the available defence in criminal offences such as alibi is unfounded because by indicating the year and month the offence 14 was allegedly committed, the appellant could raise the defence of alibi if he wanted to. The first ground of appeal fails. I will deal with the 2nd, 3rd, and 4th ground of appeal conjointly since all are concerned with analyzing the evidence adduced and its weight. It is on record that PW1 testified that he was sodomized by the appellant twice; the first time was when the appellant sent him to buy cigarette and the second time was when he sent him to buy cooking oil, and it was on that day when he told his brother, (PW2) that he was sodomized by the appellant. On the other hand, PW2 told this court that he saw PW1's underpants wet with sperm when he (PW1) went to take a shower and that was the second time when the appellant sodomized PW1. Looking at the testimonies of PW1 and PW2, the contradiction alleged by Mr. Muluge is unfounded. With regard to Mr. Muluge's argument that the testimonies of PW2 and PW4 are hearsays, I am inclined to agree with the learned state Attorney that the same were not hearsays. PW2 testified that he asked PW1 what happened after noting that his underpants had sperm, and in response, PW1 told him that he was sodomized by the appellant. PW2 talked face to face with PW1. Similarly, PW4 talked to PW1 directly, and PW1 was the one who directed her to the appellant's home. Mr. Muluge's argument that PW2 and PW4 did not witness PW1 being sodomized by the appellants thus, Mr. Muluge's contention that the testimonies of PW2 and PW4 are hearsays is unfounded because PW2 and PW4 testified what they heard from PW1 and their testimonies corroborated the testimony of PW1. In addition to the above, PW3 tendered in court PF3 (exhibit P1), which shows that "BB" was sodomized; thus, it corroborated PW1's testimony that he was sodomized. PW1 testified that he was sodomized by the appellant. He showed her mother the one who sodomized him, that is, the appellant. In her judgment, the trial magistrate stated that PW1 was a credible witness. When he was giving his testimony, he looked directly at the appellant in his eyes, showing that he was speaking the truth. Thus, she trusted his testimony. It is on record that before giving his testimony, PW1 was affirmed as he was fifteen (15) years old, not of tender age (See section 127 (4) of the TEA). Therefore the provisions of section 127 (2) of the TEA were not applicable to this case, and Mr. Muluge's concern that the provisions of section 127 (7) were not complied with is unfounded since the appellant was charged with an unnatural offence, which is under part XV of the Penal Code. So, there is nothing wrong. 16 From the foregoing, this court finds that the trial court cannot be faulted for relying on PW1's testimony because PW1 was sworn as required under the law, and the trial Magistrate was satisfied that he spoke the truth and was a credible witness. Thus, the 2nd, 3rd, and 4th

grounds of appeal have no merit and are hereby dismissed. Coming to the 5th ground of appeal, the position of the law is that there is neither a legal requirement that an investigator of a case must testify in court on the case he/ she investigated nor a minimum number of witnesses who should testify in a case. What matters is the value/relevance of the evidence adduced in a case in relation to the issues that need to be proved. In my considered view, the fact that the investigator was not among the prosecution witnesses is not fatal. The evidence adduced by PW1, PW2, PW3, and PW4, as I have explained earlier in this judgment, prove that PW1 was sodomized by the appellant. The proof of who sodomized PW1 was given by PW1 himself in his testimony, as no one witnessed the commission of the offence except PW1 himself. There are a plethora of authorities to the effect that the best evidence in sexual offences is the evidence of the victim. For instance in the case of Mohamed Said Vs The Republic, Criminal 17 Appeal No.145 of 2017, [CA], (unreported) the Court of Appeal said the following; “We are aware that in our jurisdiction it is settled law that the best evidence of sexual offence comes from the victim [Magai Manyama v. Republic (supra)]. We are also aware that under section 127(7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a sexual offence may be grounded solely on the uncorroborated evidence of the victim...” From the foregoing, this court finds that the fifth ground of appeal has no merit. In fine, this appeal is hereby dismissed in its entirety. Dated at Dar es Salaam this 24th day of February 2025 B.K.PHILLIP JUDGE 18

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