

TANZANIA / JUDGMENT

Mande Kiduma v Republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MANYARA AT BABATI CRIMINAL APPEAL NO. 14320 OF 2024 (Originating from the Court of
Resident Magistrate of Manyara at Babad in Criminal Case No. 07 of 2021) MANDE
KIDUMA..... APPELLANT Versus THE
REPUBLIC..... RESPONDENT

JUDGMENT

24h July, 2024 and 14h September, 2024 MIRINDO, J.: In the evening of 4 February, 2021 RM was supervising construction of her house at Magugu Village in Babati District when she heard her son crying in a neighbouring house. Her son, HS, aged four years had gone to the neighbouring house to play with girls who were twins. She called him and asked him why he was crying but he did not respond. Around 7 in the evening the child experienced pain when she was bathing him. Upon further enquiry, HS disclosed that Mande Kiduma, whom he referred to as uncle and who was living in the neighbouring house where HS was playing, had put sticks on HS' anus. Being a pharmacist, she checked HS' anus and found out that he had been sodomised. She reported the incident to a neighbour called Rose. She also reported the matter to a village executive officer and subsequently to Magugu Police Station. 1 At the Police Station she was issued with Police Form No 3 for medical examination. She took the child to Magugu Health Centre for medical examination. The medical examination was conducted and the findings were that there were bruises in the HS' anus. Mande Kiduma was brought before Manyara Resident Magistrate's Court and charged with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [Cap 16 RE 2019]. Mande Kiduma denied the charge and stated that he was framed. He attributed the charge to a conflict between his mother and the victim's mother over a passage to water tapes. These facts were corroborated by his mother who testified as the second defence witness. At the conclusion of the trial, the trial Magistrate disbelieved his defence and ruled it as either implausible or a belated attempt to exculpate himself from criminal liability. The trial Magistrate believed the prosecution case and convicted Mande Kiduma of unnatural offence and sentenced him to the mandatory sentence of life imprisonment. Mande Kiduma is now before me with an appeal to the High Court after obtaining leave of this Court to appeal out of time. I should point out there is a mixed up in the typed proceedings regarding the trial magistrate who convicted the appellant, Mande Kiduma. In his petition of appeal, Mande Kiduma purported to appeal against the decision of the Resident Magistrate, Honourable Kimario. A 2 closer look of the proceedings

clearly indicates that the appellant was convicted and sentenced by the Principal Resident Magistrate, Honourable Lusewa. I do not consider this mixed up to be a serious one as to invalidate this appeal or the proceedings of the trial court of the resident magistrate. In his seven grounds of appeal, the appellant, Mande Kiduma, complains that his conviction is grounded on insufficient evidence. He was unrepresented at the trial court and on the present appeal to this Court. He argued the appeal generally. He complained that the victim's mother, RM, who is their neighbour framed him with the charge of unnatural offence. He added that the twins were supposed to testify. The learned Senior State Attorney, Ms Chema Maswi, represented the respondent, Republic and argued extensively in support of the appellant's conviction. As the fate of this appeal rests on the complaint in the seventh ground and fourth grounds of appeal, I will not deal with her arguments in the remaining grounds of appeal. In his fourth ground appeal, Mande Kiduma complains that the prosecution erred in not producing, as witnesses, twins who were playing with the victim prior to the incident. It was the argument of Ms Maswi that the twins were not material witnesses because there is no evidence in the proceedings that the 3 twins were present when the offence was being committed. She asked the Court to dismiss this ground of complaint. In the seventh ground of appeal, the appellant, Mande Kiduma complains that the prosecution case was not proved beyond reasonable doubt. The learned Senior State Attorney, Ms Maswi contended that in view of *Selemani Makumba v R* [2006] TLR 379 the best evidence is that of the victim. The learned Senior State Attorney maintained that in this case the evidence of HS by itself proved the charge of unnatural offence. The victim mentioned the perpetrator as Mande and mentioned the issue of penetration. The word "stick" used by HS should be understood in context as was held in *Hassan Bakari alias Mamajicho v R*, Criminal Appeal 103 of 2012. Ms Maswi observed that the victim's testimony was corroborated by the testimony of the medical doctor and the medical examination report that was admitted as exhibit P.I. Ms Maswi called to the attention of the Court the fact that witness credibility is bolstered by his or her ability to name the perpetrator immediately as was reaffirmed in the leading case of *Marwa Wangiti Mwita v R* [2000] TLR. By immediately mentioning the appellant to witnesses as the perpetrator of sodomy, the learned State Attorney argued, HS was a credible witness who gave a truthful account of what took place. 4 Ms Maswi concluded that the prosecution case was proved beyond reasonable doubt by five prosecution witnesses and the medical examination report produced in court. This is a first criminal appeal originating from Manyara Resident Magistrate's Court. The role of the first appellate court has been stated expounded in a number of decisions. In *Kasema Sindano alias Mashuyi v R*, Criminal Appeal 214 of 2006, the Court of Appeal in a judgment delivered by Rutakangwa JA had this to say: The law, as we understand it, is that on a first appeal, it is the appellant's legitimate right to have the entire evidence re-evaluated by the appellate court. The appellant is entitled to have that court's own consideration and views of the entire evidence and its own decision thereon. This duty is not discharged if the evidence for both sides is only read separately without being subjected to a fresh and exhaustive scrutiny, as was done in this case.... [Emphasis original] With this principle in mind, I turn to consider the complaint of sufficiency of evidence to support the charge of unnatural offence against Mande Kiduma. Were the twin material witnesses? The evidence of RM who is the victim's mother and HS who is the victim child is consistent that the HS was playing with twins in the neighbouring

house. 5 I agree with the learned State Attorney that it is an established principle in *Selemani Makumba v. R* [2006] TLR 379 that the victim of rape (a fortiori of unnatural offence) is the best evidence in sexual offence. Yet, there is also a principle restated in *Mohamed Said v R* (Criminal Appeal No 145 of 2017)

[2019] TZCA 252 that the victim's testimony is not gospel truth: it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. RM was the first prosecution witness and she testified about the twins. In the handwritten version of the proceedings, she stated that: On 4/2/2021 at 17.45 in the evening, I was supervising the technician as we were still constructing the house at home. When I was supervising the workers my son Aitham was at my neighbours house (Maria Kaduma house) playing with some other girls who are twins, there, they are girls. At the beginning of her testimony, she clarified that the victim who is HS has a nickname Aitham. On the other hand, HS did not state in examination -in-chief where he was at the time of the incident. Nevertheless, in responding to questions of clarification from the trial court, HS made the following four alarming statements which appear in the handwritten version of the proceedings: 6 I was alone when the accused was putting vijiti inside my anus

- My colleague were praying alongside me
- By the time when the offence was committed we were outside
- My mother was also around Both versions belie the fact that the twins were not material witnesses. There were right persons with direct evidence to clarify the presence of the victim's child in their compound and the presence of the appellant in the compound. Left unexplained HS version of the event makes the commission of the offence highly improbable. How could the sodomy take place in the presence of a mother's child without the mother witnessing the act? How could the sodomy take place in the presence of the twins without the twins being accomplices? These are some of the questions that make the twins' testimony material. But the twin were not the only material witnesses. In her testimony, RM, mentioned the presence of a technician and workers at the time she heard her son crying. These persons could have clarified some doubts in the prosecution case. In *Peter Mwafrika v R*, Criminal Appeal 413 of 2013, the Court of Appeal held that the accused is entitled to benefit of doubt whenever the prosecution fails to call a material witness who could have clarified the doubts in the prosecution case. The Court observed that: 7 They would have, in our opinion, given independent evidence on what actually transpired at the scene of crime. Failure to call them without good cause being shown did, in our view, prejudice the course of justice in this case. ... The prosecution, therefore, needed to produce more evidence implicating the appellant, given the serious nature of the offence with which he was charged. The loopholes left unanswered ...should be, in the interest of justice, interpreted in favour of the appellant. As stated earlier, RM told the trial court that she immediately reported the act of sodomy to her neighbour, one Rose, who advised her to report the incident to the village executive officer, Mzee Khamis. RM added that the village

chairman was also called and "they" were given a letter. She did not state the date in which she reported the incident to the police. The Police Form No 3 is however problematic. The first part of the Form, which is normally filled by police officers, contains a date that has been rewritten after the earlier one has been completely cancelled by an ink pen without any indication as to who did so. The fresh date is re-written as 4/2/2021. This is the date of the incident. The same problem is also in relation to the time in which the Form was apparently issued. The time is re-written as "2.30 hrs". I assume this to be referring to local time as that part is filled in Kiswahili language. So, assume "2.30" hrs" to mean 8.30 at night. The testimony of the Assistant Medical Officer, Chizuna Mjina, the third prosecution witness was that HS and his 8 mother were at Magugu Health Centre around 9.00 PM. The Form indicates the time to be 2140 hrs. At that 9 PM the victim's mother was also in the residence of the fourth prosecution witness, Amis Athuman, a ten-cell leader. The fourth prosecution witness advised her to obtain a letter from the village executive officer and to report the matter to the police. RM testified as much. It is untrue according to this version that the matter was reported to Magugu Police Station at "2.30". Given that parts which are filled by the police have been cancelled without indication at a least by a signature as to who did so, there is reason to doubt the genuineness of the Police Form No 3. This version also gives some reason to doubt the chronology of events presented by the victim's mother. The fifth and last prosecution witness was WP 5594 CPL Luena. She testified that she was given the police case file concerning this case on 10 February 2021 for further investigation. She categorically stated that at that time the "Accused was still at large." She interrogated the victim and the Assistant Medical Officer. She also had other witness statements. Logically, the appellant must have been arrested after CPL Luena took over the investigation of the case and satisfied herself that the appellant has something to do with the unnatural offence. CPL Luena never mentioned the date when the appellant was arrested 9 but obviously, he must have been arrested on 10 February 2021 or any other date afterwards. In his defence the appellant implied time in which he was arrested. He stated: In February 2021 I returned home from town in the evening and found the mother of...[HS] with a stick she wanted to wait on my mother, she was complaining why my mother was using the passage reading [?] to the water tapes I told her why she wanted to came [sic] my mother and then I was arraigned to court charged. I never committed the offence against the victim as charged. It was just grudges the mother had with me. The case was formed a week after I found the mother with a stick on my mother. The appellant's mother, Maria Mande, offered somewhat similar account: One day Mande returned from town and found that woman cursing me and that I should wait and see, she had a stick, Mande told her not to hurt me. And she told Mande that everyone had a mother and that she will deal with him A week after [sic] my son was charged with this case. 10 I am surprised why she did not apprehended [sic] Mande at the scene/call people if it truly happened. Even if I were to agree with the learned Senior State Attorney that the issue of conflict between the victim's mother and the appellant's mother was belatedly raised, it is undoubtedly clear from the defence evidence and the evidence of CPL Luena that the appellant was not immediately arrested after the incident. The defence periodisation of when the appellant was arrested is consistent with CPL Luena

account. It is a period of seven days from the date when the incident is alleged to have taken place to when CPL Luena assumed the investigation of this case on 10 February 2021. Two principles of evidence are at play when there is a delay in arresting a suspect. The first is the principle of unexplained inordinate delay in arresting the suspect. Inordinate delay is a question of fact. One of the better-known cases on the principle of unexplained inordinate delay is that of Juma Shabani alias Juma v R, Criminal Appeal 168 of 2004. Certain prosecution witnesses, in this case, claimed to have identified the appellant among the bandits who invaded the house of the first prosecution witness at Lyombo Village on the outskirts of Tabora Municipality and committed armed robbery. Other persons were arrested soon after the incident, charged and convicted but the appellant was arrested well over a year, charged and convicted of armed robbery. The Court of Appeal 11 ruled that the unexplained inordinate delay was a ground for discrediting prosecution witnesses who claimed to have identified the appellant during the armed robbery: Curiously, neither the investigating officer in this case nor any other police officer for that matter gave evidence at trial in this case. As the appellant has persistently maintained that he remained at the village throughout without being arrested until 6.3.2001 when he was arrested, the investigating officer would be in a better position to clarify on the issue. The police would testify whether they looked for the appellant soon after the incident but could not arrest him perhaps because he had disappeared from the village until the time of his arrest more than a year later. As this was not done, it raises doubt as urged by the appellant that PW.1, PW.2 and PW.3 may well not be truthful in their evidence that they identified the appellant during the incident. Apart from casting doubt on the credibility of PW.1, PW.2 and PW.3, the absence of the police testimony in this case also raises doubt on the prosecution case. This principle has been reaffirmed in several cases including recent ones such as Wambura Marwa Wambura v R (Criminal Appeal No. 115 of 2019) [2022] TZCA 429 and James Ryoba Waing'ari v R (Criminal Appeal No 475 of 2015)

[2018] TZCA 558 The second principle, often clouded or overshadowed by inordinate delay, is the inexplicable or senseless delay in arresting a familiar or readily available suspect. This principle is grounded strictly not on delay but immediacy in 12 arresting a well-known or readily available suspect and not mere delay. This principle is frequently applied whenever a witness claims to have either identified a suspect during the commission of an offence or immediately reported the incident and named the suspect. If either claim is made out and a suspect is not immediately arrested, there must be sufficient reasons for the delay otherwise the witness account is liable to be rejected in court. In Kulwa s/o Mwakajape v R, Criminal Appeal 35 of 2009, two prosecution witnesses who were the victim of robbery with violence claimed to have identified the three accused persons when their house was invaded by a group of bandits at night. After the raid, the first prosecution witness reported the incident to a commander of people's militia who raised an alarm to the people around the area. That witness mentioned to the people who responded to the alarm that the accused persons were involved in robbery. The incident was reported to the police and the accused persons were charged before Kwimba District Court with the

offence of robbery with violence. They were convicted and unsuccessfully appealed to the High Court. On a second appeal to the Court of Appeal, the first accused person, Kulwa s/o Mkwajape maintained that he was not properly identified during the incident and if he was properly identified and mentioned to other people why was he not arrested at the same night when he responded to the alarm. The Court of Appeal upheld this contention: 13 As for the first appellant, there is the aspect pertaining to his arrest which also casts doubts on the credibility of PW.1 and PW.2. if as alleged by PW.1 and PW.2 in their evidence that they identified the appellants during the incident and named them to the people gathered at the scene, the question is why the first appellant was not arrested the same night when the villagers had gathered in the presence of the villiage leadership and the People militia commonly known as sungusungu (PW.3. PW.4 and PW.5)? As claimed by the first appellant, the evidence clearly shows that he was arrested the following morning at 9.00 a.m. Having attended the gathering at the scene of robbery in response to the alarm, if PW.1 and PW.2 mentioned that the first appellant was among the suspects, it raises doubt why he was not arrested there and then. In these circumstances, it is possible that the first appellant was not named at the gathering by PW.1 and PW.2. In Hassan Mawazo v R, Criminal Appeal 11 of 2014, the Court of Appeal concluded that the unexplained delay in arresting the appellant was a ground for discrediting certain prosecution witnesses: ...In the present case the delay of two days to arrest the appellant who was allegedly well known to PW1 and lived in a nearby village, casts doubts on the credibilities [s/c] of PW1 and PW2. The application of this principle was also at play in acquitting the third appellant in Abubakar Hamisi and Two Others v R, Criminal Appeal 87 of 2004. 14 Speaking of the effect of unexplained delay in naming a suspect, the Court of Appeal in Festo Mawata v R, Criminal Appeal 299 of 2007 observed that: Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted. In the instant appeal, there is inexplicable one-week delay in arresting the suspect who was the neighbour of the victim's child despite the claims of the victim's mother reporting the incident on the day it occurred. This inexplicable delay has not been resolved in the instant case. It cast doubt on the veracity of the first prosecution witness. In the final analysis, I disagree with extensive submissions made by the learned State Attorney, Ms Maswi, that the prosecution case was proved beyond reasonable doubt. The prosecution case is partly implausible and partly doubtful on account of not calling material witnesses, doubtful features in the reporting of the incident, and inexplicable delay in arresting the appellant. For all these reasons, I am of the firm view the decision of the trial court cannot be allowed to stand. I allow the appeal by quashing the conviction and sentence imposed by the Court of Resident Magistrate of Manyara Resident. It is 15 hereby ordered that Mande Kiduma be released from custody unless he is otherwise withheld for another lawful cause. DATED at BABATI this 13th day of September, 2024 IRINDO JUDGE COURT: Judgmen vered in chambers this 19th day of September 2024 in the presence of the appellant in person and in the presence of Leah Vyosena, State Attorney for the Respondent B/C: William Makori (RMA). Right of appeal explained F.M.

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