

TANZANIA / JUDGMENT

PRISCUS PETER SHAYO V R Tanzilii

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1 January 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB REGISTRY AT
MOSHI RM CRIMINAL APPEAL NO. 23525 OF 2024 (Originating from Criminal Case No. 10969 of
2024 of the Resident magistrate's Court of Moshi at Moshi) PRISCUS PETER SHAYO
..... APPELLANT VERSUS REPUBLIC
RESPONDENT

JUDGMENT

04/03/2025 & 04/04/2025 SIMFUKWE, J. The appellant Priscus Peter Shayo was arraigned before the Resident Magistrate's Court of Moshi (trial court) charged with Rape 1 contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2022 and Unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code (supra). It was alleged before the trial court that on diverse dates between February and April 2024 at Legho-Mulo Kilema Kusini area within Moshi District in Kilimanjaro Region, the appellant had carnal knowledge of one J d/o G a girl aged twelve (12) years old. It was also alleged that on the same dates the appellant did have carnal knowledge of the same girl against the order of nature. The appellant pleaded not guilty on both counts. Before the trial court, prosecution witnesses testified to the effect that the victim was staying with her grandmother and her paternal uncle (appellant). It was alleged that the appellant used to rape and sodomise the victim at his house several times. The victim told her grandmother who did not take any action. Then, the victim went to her mother and informed her. Her mother advised her to report to the chairperson of Legho. The said chairperson did not take any action. Thereafter, the victim reported to PW2 who made follow up and discovered that the victim had escaped from her grandmother because she was being raped and sodomised by the appellant. PW2 asked the appellant who denied while laughing. Then, PW2 reported the incident at the police station. PW3 the 2 medical doctor who attended the victim confirmed that the victim was raped and sodomized. PW4 was the teacher who was staying with the victim after being handed over to her by police officers. PW4's evidence corroborated evidence of PW1 and PW2. PW5 was the cook at the victim's school who interrogated the victim about her absenteeism at school. The victim narrated her tragedy to her. That's when PW5 informed PW2 (the chairman of Food Committee). PW6 was the investigator of the case who recorded the statements of witnesses and cautioned statement of the accused. He visited the scene of crime. PW6 said that he was told by the victim that the appellant used to rape and sodomise her when her grandmother had gone to the church. Also, PW6 interrogated the doctor who attended the victim. After completion of investigation,

PW6 was satisfied that the victim was raped and sodomised. In his defence before the trial court, the appellant denied to have committed the offences. He said that the case was fabricated against him because he had promised to make follow of their farm. He raised some doubts in respect of the testimony of the victim. That, she could have informed relatives, school mates, neighbours and church members instead of telling other persons who were not family members. 3 After considering evidence of both parties, the trial court convicted and sentenced the appellant to thirty years imprisonment on both counts. The appellant was aggrieved with the conviction and sentence. He filed the instant appeal on the following grounds:

1. That, the learned trial magistrate strayed into error of law when he failed to note that the principle stipulated under section 127(2) of the Evidence Act, Cap 6 R.E 2022 were violated there were no question show to be asked by the trial magistrate geared at obtaining answers as to whether the witness (PW1) possessed sufficient intelligence to justify the reception of her evidence as propounded by case law and promises to tell the truth to the court and not to tell lies.” (sic)
2. That, the learned trial magistrate strayed into error of law when he failed to note that the essential ingredient of the offence of rape and unnatural offence, that is penetration was not proved at all, as the evidence of PW1 does not offer proof of penetration.
3. That, the learned trial magistrate strayed into error of law when he failed to note that there was material variance of the charge and the evidence adduced. 4
4. That, the learned trial magistrate erred in law and factual analysis when he failed to note that the age of PW1 was never proved.
5. That, the learned trial magistrate erred in law and factual analysis when he failed to note that the essential prosecution witnesses were never summoned to testify.
6. That, the learned trial magistrate erred in law and factual analysis when he relied on weak, inconsistency, contradictory with material discrepancies and uncorroborated prosecution evidence.
7. That, the learned trial magistrate erred in law and factual analysis when he failed to note that the charge against the appellant was not proved beyond any reasonable doubt. The appellant prayed his appeal to be allowed, conviction be quashed, sentences be set aside and to be set at liberty. The appeal was ordered to be argued by way of written submissions. The appellant had no representation while Mr. Frank Ong’eng’a learned State Attorney contested the appeal for the respondent. The appellant started to argued the third ground of appeal and abandoned the first ground. He submitted inter alia that in the case at hand the particulars of offences differ with the evidence of prosecution witnesses in regard to when the incident occurred. Whereas the charge 5 alleges that incidents were committed on diverse dates between February to April 2024, PW1 stated that the appellant started committing the offences in 2023 and the last time to commit the offence was April 2024. It was stressed that true evidence in sexual offences comes from the victim while in this case

evidence of the victim was not compatible with the charge. He cited the case of Abel Masikiti v. R, Criminal Appeal No. 24 of 2015 (unreported) in which the Court of Appeal held that: “If there is any evidence or uncertainty in the dates then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal.” In his reply, the learned State Attorney argued the third, fourth and sixth grounds jointly. However, he did not reply the third ground of appeal. His arguments centred on the fourth and sixth grounds only which are in respect of proof of age of the victim and contradiction between testimonies of PW1, PW3 and exhibit PE1. It's trite law that variance between the charge sheet and adduced prosecution evidence is fatal if the prosecution has not amended the charge sheet. In the case of William Felix Kulaya and Another vs Republic 6 (Criminal Appeal No. 522 of 2021) [2025] TZCA 283 (25 March 2025) at page 12, it was held that: “It is trite that when there is variance or uncertainty in the charge sheet, the proper remedy is to amend the charge under section 234 (1) of the Criminal Procedure Act (the CPA). In the case at hand, the prosecution ought to have moved the trial court to amend the charge sheet and allow the appellant to plead to the altered charge. In the case of Thabit Bakari v. Republic, Criminal Appeal No. 73 of 2019 [2021] TZCA 259 (17 June 2021) TanzLII, the Court stated that: - " It is well settled that in such a situation, failure to amend the charge sheet is fatal and prejudicial to the appellant. This is because such anomaly leads to serious consequences to the prosecution case.” I have gone through the impugned charge sheet and the evidence of the victim at page 5 first paragraph of the typed proceedings. It is true that the testimony of the victim in respect of when the two charged offences were committed against her contradicts the charge sheet. The particulars in the charge sheet indicate that the offences were committed on diverse dates between February and April 2024, while the victim said 7 that the offences were committed since 2023. Unfortunately, the prosecution did not amend the charge sheet under section 234(1) of the CPA as required by the law. In the circumstances, there is no alternative other than to find the impugned charge sheet unproven. Hence, the third ground of appeal has merit. On the second ground of appeal the appellant was of the view that essential ingredient of the offences of rape and unnatural offence was not proved beyond reasonable doubts. In particular, it was stated that penetration was not proved. The appellant submitted that the victim did not elaborate how the appellant committed the two offences. He subscribed to the case of Mathayo Ngalya @ Shaban v. R, Criminal Appeal No. 170 of 2006 (unreported), which held that: “The essence of the offence of rape is penetration of the male organ into the vagina..... For the offence of rape, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence.” 8 Mr. Ong'eng'a contended that at page 5 of the trial court proceedings the victim explained how the appellant used to rape and sodomise her. Further reference was made to page 9 and 10 of the trial court proceedings where a clinical officer testified to the effect that the victim was penetrated with a blunt object as she had no hymen and the muscles of the anus were loose. I agree with the learned state attorney that the victim explained how the two offences were

committed. At page 5 second paragraph of the trial court proceedings the victim said that: “He used to put off my clothes and forced me to sleep to his bed or my bed, he then have (sic) sexual (sic) with me at my back and my vagina.” Emphasis added It is evident that the bolded words above connote the two charged offences of rape and unnatural offence. Penetration was also proved through the testimony of PW3 the clinical officer who examined the victim and tendered exhibit PE1. Therefore, the prosecution managed to prove penetration beyond reasonable doubts. Thus, the second ground of appeal has no merit. On the fourth ground of appeal, it was the complaint of the appellant that the age of the victim was not proved. He made reference to page 4 and 5 of the trial court proceedings where the victim said that she was 12 9 and 14 years old respectively. The appellant explained the settled law on how to prove the age of the victim as it was stated in the case of Shani Chamwela Suleiman v. R, Criminal Appeal No. 481 of 2021 (unreported) which held that: “We wish to restate the settled position of the law as it was done by the first appellate Judge that, the age of the victim in a court of law can be proved by a parent, victim (as the case herein), relative, medical practitioner or, where available by production of birth certificate.” Guided by the cited authority, the appellant was of the view that evidence of the victim regarding her age was insufficient. Mr. Ong’eng’a conceded to the discrepancy in respect of the age of the victim. However, he was of the opinion that the discrepancy was minor and that whether the victim was 12 years old or 14 years, does not change the fact that the victim was the child of tender age. It was also noted that the appellant testified that the victim was 14 years old. I have examined evidence of both parties; the record is clear that evidence of both parties proved that the victim was below 18 years old. Since the appellant acknowledged in his defence that the victim was 14 10 years old, challenging it in this appeal is an afterthought. I therefore dismiss the fourth ground of appeal for being devoid of merit. On the fifth ground of appeal, the appellant faulted the trial court for its failure to note that material prosecution witnesses were not called. In his submission in chief, he stated that since the grandmother of the victim had all the information about the incidence, she could have been called as a material witness. Also, the appellant mentioned the mother of the victim as another material witness who was not called to testify. Moreover, the appellant criticised the act of the mother of the victim of not taking any action and advised the victim to share the information to the chairman who also did nothing. Mr. Ong’eng’a replied by citing section 143 of the Evidence Act which provides that no particular number of witnesses shall in any case be required to prove any fact. He also cited the case of Theophil Salaho

- v. R, Criminal Appeal No. 9405 of 2024 [2024] TZHC 10779 which held that it is the prosecution side which decides whom to call to testify on a certain fact. The learned State Attorney was of the opinion that the prosecution side managed to prove the offence against the appellant beyond reasonable doubts. 11 I concur with the learned State Attorney that the prosecution was at liberty on whom to call and a number of witnesses to be called. On the sixth and seventh grounds of appeal, the appellant noted the contradiction in respect of age of the victim and date of commission of the offence as already noted herein above. The learned State Attorney conceded to the contradictions although he termed them as minor. It is

settled law that there are material discrepancies and minor discrepancies. Material discrepancies are those which affect the prosecution case while minor discrepancies do not affect the prosecution case. In the case of Abel Orua @ Matiku & Others vs Republic (Criminal Appeal No. 441 of 2020) [2024] TZCA 78 (21 February 2024) at page 29 and 30, it was emphasized that: "It is trite law that, it is only contradictions or inconsistencies which affect the central story which are to be considered to be material and adverse to the party in whose favour the evidence is given. Such contradictions or inconsistencies should not be those that are of an insignificant nature. See- Mukami w/o Wankyo v. Republic [1990] T.L.R. 46, Shamari Athuman @ Mwanja & Another v. Republic, Criminal Appeal No. 650 of 2021 and 12 Dickson Elia Nsamba Shapwata & Another v. Republic, Criminal Appeal No. 92 of 2007 (both unreported)." In our case, while the contradiction in respect of the age of the victim is insignificant, the contradiction on the date of commission of the offence is significant. That is because the two contradictory ages of the victim are below 18 years. Thus, whether the victim was 12 or 14, statutory rape will still be justified. However, the uncertainty on whether the victim started to be raped in 2023 or February 2024 goes to the root of the case. Based on the variance between the charge sheet and adduced prosecution evidence, which also raised contradiction between PW1's evidence and PW6's evidence, I agree with the appellant that the case against him was not proved beyond reasonable doubts. Another doubt is in respect of inaction of the mother of the victim which is abnormal. I am of considered opinion that the act of the mother of the victim of not taking any action in this case, raises some reasonable doubts on part of prosecution. That said, this appeal is found to be meritorious save for the second, fourth and fifth grounds of appeal which have been dismissed. On the strength of the third, sixth and seventh grounds of appeal, the conviction against the appellant is hereby quashed, sentences on both counts are 13 set aside and the appellant is ordered to be set free forthwith, unless held for other lawful reasons. Appeal allowed. Dated and delivered at Moshi this 04th day of April 2025. X S. H. SIMFUKWE JUDGE
Signed by: S. H. SIMFUKWE 04/04/2025 14

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Prepared on 13 October 2026 · Esheria