

TANZANIA / JUDGMENT

JUDGMENT CRIMINAL APPEAL NO 31723 OF 2024 SHABAN HAMIS MAKONGORO VS REPUBLIC FINAL NEW

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DODOMA DISTRICT
REGISTRY) AT DODOMA CRIMINAL APPEAL NO. 31723 OF 2024 (Arising from Criminal Case No.
39395 of 2023 of the Resident Magistrate Court of Singida at Singida before Hon. R.C. Migan, RM
II dated 26th September, 2024) SHABAN S/O HAMIS @ MAKONGORO.....
APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

19th Nov.& 13th December, 2024 KAGOMBA, J The appellant herein was convicted by the Resident Magistrate Court of Singida at Singida (henceforth "the trial court") for Unnatural Offence contrary to section 154(1) & (2) of the Penal Code, [Cap 16 RE 2022]. He was sentenced to serve a life imprisonment. It was alleged before the trial court that on 23/11/2023 at Ighuka village, Ikungi Ward, Division and District within Singida Region the appellant did have carnal knowledge of one MR (her real name is withheld to protect her identity), a child of two years and eleven months, against the order of nature. Despite denying the charge, the trial court was satisfied that the 1 prosecution had proved the case against the appellant beyond reasonable doubt, hence convicted him and sentenced him accordingly. Being aggrieved, the appellant has filed this appeal to challenge both the conviction and the sentence based on four grounds which can be paraphrased as follows: -

1. That, the learned trial Magistrate erred in law and fact in convicting him basing on prosecution evidence which was not corroborated and was received contrary to section 127(2) of the Evidence Act.
2. That, the learned trial Magistrate grossly erred both in law and fact in its finding for willfully refusing to follow the legal procedure and settled principles when the defence of a lib i is entered and for disregarding the appellant's defence while the prosecution evidence available on the record cannot not sustain conviction especially for an offence attracting severe sentence of life imprisonment.

3. That, the learned trial Magistrate erred both in law and fact by convicting and sentencing the appellant regardless of failure by the prosecution to prove the case to the required standard as there were significant discrepancies in the prosecution evidence. 2
4. That, the learned trial Magistrate erred both in law and fact by convicting the appellant without considering his defence. At the hearing, the appellant was unrepresented while the respondent enjoyed the service of Ms. Mulongo Tenge, learned State Attorney. When called upon to address the court on his appeal, the appellant who is a lay person, was short of words. He only prayed the court to consider his grounds of appeal, stated herein. Replying for the respondent, Ms. Tenge, opposed all the four grounds of appeal. She preferred to address the first and third grounds jointly, and the rest of the grounds separately. Starting with the third ground, the learned State Attorney disagreed with the appellant's lamentation that the prosecution failed to prove the offence beyond reasonable doubt owing to embedded contradictions their testimonies. Her position is that the offence was proved beyond reasonable doubts. Clarifying, Ms. Tenge summarized the testimony of the victim's mother (PW2), on how the victim was found crying outside the house of her grandmother while the appellant was inside pretending to be sleeping and 3 how the victim named him as the culprit. She added that when PW2 noted that the victim was unable to walk properly, she became curious and examined her whereupon she found feces and blood around the victim's anus. She found corroboration of the above testimony in the evidence of PW1, a medical doctor, who also found the victim's anus with feces, bruises and blood. According to Ms. Tenge, the testimony of PW1 and PW2 was further corroborated by the appellant himself vide his cautioned statement which was admitted in evidence as Exhibit P2. The learned State Attorney urged the court to accord much weight that exhibit for a reason that it was recorded at Police in the presence of PW5, who is a witness called to witness the recording of the said cautioned statement at the instance of the appellant. In Ms. Tenge's view, since the offence required proof of penetration, the above evidence proved the same beyond reasonable doubts. As regard the complaint in the first ground that the provision of section 127(2) of the Evidence Act, was not observed, Ms. Tenge referred to page 15 of the proceedings to argue that the trial court took judicial notice of inability of the victim, being a child, to express herself, hence unable to 4 testify. For that reason, she argued, absence of corroboration in terms of section 127 of the Evidence Act, did not affect the proceedings as each case has to be decided according to its own circumstances. Citing the case of Leonard Joseph @Nyanda v. R, Criminal Appeal No. 186 of 2017 CAT at DSM, the learned State Attorney argued further that conviction can be entered based on other available evidence, without the victim testifying, if the circumstances would not permit her to do so. As for the second ground of appeal, Ms. Tenge vehemently opposed the appellant's lamentation that his defence of a lib i was not observed by the trial court. The learned Attorney firstly faulted the appellant for invoking the defence of a lib i without having given a prior notice to rely on the same as required by the provision of section 194(4) of the Criminal Procedure Act, [Cap 20 R.E 2022]. Citing Hussein Mwishehe Sudi vs. Republic, Criminal Appeal No. 363 of 2017 CAT at DSM, Ms. Tenge clarified that any person who wishes to rely on a lib i has to give

notice to that effect before hearing, a requirement the appellant didn't do, hence he cannot do it at this stage. Secondly, she submitted that the defence of a lib i would still not stand because the testimonies of PW2 at page 12 to 13 of the proceedings and 5 that of PW4 at page 27 to 28 show that the appellant was arrested at the scene of crime and was taken to Police alongside the victim right from there. She added that, even when evidence was being adduced by prosecution witnesses concerning his presence, the appellant did not cross-examine them on that aspect signifying his acceptance of that fact. For those reasons, Ms. Tenge prayed for dismissal of the second ground of appeal for lacking in merits. Likewise, Ms. Tenge registered her opposition to the fourth and last ground of appeal. She disagrees with the appellant's lamentation that his defence evidence was not considered. In reply, she referred the court to page 6 of the trial court judgment to argue that the learned trial Magistrate did consider the appellant's defence and carefully analyzed it. However, she was quick to add that if this court would deficiencies in the manner the trial Magistrate dealt with the defence evidence, the court be minded to step into the shoes of the trial court and do the needful. She cited the decision of the Court of Appeal in Siaba s/o Mswaki vs. Republic, Criminal Appeal No. 401 of 2019 CAT at DSM, as an authority for her prayer. 6 In the end, the learned State Attorney prayed for dismissal of the appeal and urged the court to uphold the decision of the trial court. Rejoining, the appellant expressed his mistrust of the prosecution witnesses for a reason that some of them colluded in framing up this case against him to avoid paying his debt. Clarifying, the appellant stated that he was assigned by his uncle, one Iddi Hamis and his relative Ramadhani Hamis to make bricks for them whereby each owed him TZS 700,000. Having found that they were dilly dallying to pay their debts, he visited them on 23rd November, 2023 to collect his debt only to be trapped in the crime, which he described as dubious. The appellant further rejoined that his confession at Police was procured by torture. He was emphatic that the victim toddler was never sodomized as alleged, but was injured by a piece of tree ("kim t") as per testimony of one of the defense witnesses during trial. In the end, the appellant prayed the court to consider both sides of the story and do him justice. After a careful consideration of the parties' submissions, the grounds of appeal and the law, there is one broad issue for determination, which is; 7 whether the prosecution proved the case against the appellant beyond reasonable doubt. The provision of Section 154(1) (a) of the Penal Code under which the appellant was charged and convicted, provides: - "154. -(1) A n y p e r s o n w h o - (a) h a s c a r n a l k n o w l e d g e o f a n y p e r s o n a g a i n s t t h e o r d e r o f n a t u r e ;

- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years. (2) W h e r e t h e o f f e n c e u n d e r s u b s e c t i o n (1) i s c o m m i t t e d t o a c h i l d u n d e r t h e a g e o f e i g h t e e n y e a r s t h e o f f e n d e r s h a l l b e s e n t e n c e d t o l i f e i m p r i s o n m e n t . " [Emphasis added] Therefore, to prove the charge based on section 154(1) (a) and 154(2) as above, the prosecution was expected to lead evidence to the effect that, one; the appellant had penetrated the victim against the order of

nature, 8 that is, through the victim's anus. Two; the victim is a child under the age of eighteen years. According to the trial court, both elements were proved beyond reasonable doubts, a finding which the appellant disagrees for the reasons lamented in his four grounds of appeal. In brief, the appellant laments about reliance on un-corroborated evidence in contravention of section 127(2) of the Evidence Act; wilful refusal of the trial court to follow the law governing the defence of a lib i and for disregarding his defence given the gravity of punishment set by law for the said offence; prosecution evidence being embedded with contradictions, hence conviction entered without proof of the case beyond reasonable doubt and non-consideration of the appellant's defence before conviction. Starting with lack of corroboration of prosecution evidence, as lamented in the first ground of appeal, the appellant appears to argue that the provision of section 127(2) of the Evidence Act, has been contravened. This provision of the law states as follows: - "(2) A child o f tender age m ay give evidence without taking an oath or making an affirm ation but shall, before giving evidence, prom ise to te ll the truth to the court and not to te ll any lies". 9 While the appellant didn't clarify how the above provision was contravened, the learned State Attorney submitted that the court judicially noticed the victim's inability to testify due to her tender age. She argued that despite the victim's inability to adduce evidence, the trial court was satisfied with the rest of the prosecution evidence. I have perused the trial proceedings for 19/02/2024. The same reveal that the toddler victim was presented to court on that day, and the following transpired between State Attorney and the court: "S /A - The child is three (3) years cannot talk. She is here in court. COURT: This court has seen the child; she is young about three (3) years. She is crying in court and carried by her mother. Therefore, her evidence cannot be recorded as she cannot talk. R .C. M IG A N I- S R M " The trial Magistrate repeated the same observation in her judgment as follows: " This court was able to see the child on 19/2/2024 she is young about three (3) years, she was crying in court and was carried by her m other hence could not talk. However, the 10 accused challenged that the victim was brought to court but did not testify. Indeed, the victim did not testify due to her age. From the above excerpts it's true as it was submitted by Ms. Tenge that the trial court judicially noticed the victim's inability to testify. I have no good cause to fault the decision of the learned trial Magistrate who had the advantage of seeing the toddler. Therefore, although the victim could be considered competent to testify, she is not compellable owing to her young age as observed by the trial court. Probably, what the appellant questions in the first ground of appeal is whether, in absence of the victim's testimony, his conviction was properly procured. An answer to this question may require further examination of the evidence on record. It is discernible from the available evidence that no eye witness was paraded by the prosecution to prove that the appellant sodomized the victim. Apparently, the learned trial Magistrate made it clear as to which evidence she relied upon to prove penetration, being a key element of the offence. She stated: "Therefore, th e o n ly evid en ce re m a in s to p ro ve p e n e tra tio n w as o f PW 1, PW 2f PW 3, PW 4f PW 5 a n d 11 PW 6. A ll stated that the victim was found with feces and blood discharge in her anus, some bruised (sic) and could not w alk." [Em phasis added]. Thereafter, the learned Magistrate went on to analyze the evidence of each of the above-mentioned witnesses, starting with PW1 the Medical doctor

who found that the victim was penetrated, PW2 the victim's father who found the victim crying and upon inquiring as to why she was crying, the victim told him that she was "beaten by Shaban". The learned trial Magistrate found this piece of evidence duly corroborated by the testimony by PW3, the victim's mother, who was also informed by the victim that she was "beaten by Shaban". Similar testimonies came from PW4 Samwel Mkhandi Lihonde, who is a neighbour and a village leader; PW5 Iddy Hamis Selemani, a maternal uncle to the appellant, as well as PW6 F8 D/SSGT Dominic Lukigo Mayala who recorded the appellant's cautioned statement (Exhibit P2). This is all we have in record to link the appellant with the offence. It was stated by the Supreme Court of Uganda in Gapco (U) Ltd vs. A.S Transporters Ltd., Civil Appeal No. 7 of 2007, that the first appellate court has a duty "to subject the whole evidence on record to a fresh and exhaustive scrutiny and to draw its own conclusions of facts giving allowance to the fact that it has not seen the witnesses testify". The same position was stated by the Court of Appeal in *Mapambano Michael @Mayanga vs. Republic* [2016] TZCA 310 (25 April 2016, among other decisions. Having assumed the above role as the first appellate court, I think there are questions arising from the evidence on record that need further deliberations. Firstly, on whether there was penetration in the anus of the victim, I am of a clear opinion that sufficient evidence has been adduced to answer this issue in the affirmative. Here I have in mind the testimony of the Medical Doctor, one Baraka Jason Swila (PW1), who testified that he received the victim on 23/11/ 2024 accompanied by her father PW2. According to PW1, the victim's underwear was found with stains of feces and blood; there were bruises in her anus as well as feces particles; her anus sphincter muscles were loose and there were remains of spermatozoa, all indicating that the victim was penetrated by a blunt object. The evidence of PW1, was corroborated by PW2, PW3, PW4 and PW5 all of whom saw the feces in the anus of the victim. PW3 testified that she found pubic hairs and stains of blood in the victim's anus. All these witnesses also testified that the victim pointed to her buttocks when telling them that she was beaten by Shaban, and that she was unable to walk. For argument's sake, the mere fact the victim had stains of feces in her underwear could not, by itself, prove penetration since it is not uncommon to find feces in the underwear of children of the age of three. However, feces coupled with stains of blood as well as loosening of anus sphincter muscles of the victim as evidenced by the PW3 (Exhibit P1), proved sufficiently that the victim was, indeed, penetrated by a blunt object. Likewise, the prosecution was able to prove the age of the victim. According to the trial court, the victim was born on 4/11/ 2021. The Court of Appeal has dealt with the issue of proof of age in its various decisions. (See: *Issaya Renatus vs. Republic* (supra); *Reji Mafita vs. Republic*, Criminal Appeal No. 337'B' of 2020 (unreported); *Wilson Elisa @Kiungai vs. Republic*, Criminal Appeal No. 449 of 2018 (Unreported) and *Mathayo Laurence William Mollel vs. Republic*, (supra). In the latter case, it was held that "The age of a person may be proved by the victim, relative, parent, or where available, the birth certificate". According to PW1, PW2 and even PW6, the victim was aged between Two and half years and three. Age of the victim, particularly the fact that she is under the age of eighteen has not been a matter of dispute. I am therefore satisfied that this element of the crime has also been proved at the required standard. Having established

penetration and the age of the victim, the most crucial issue, is whether it is the appellant who sodomized the victim. To me this issue is very tricky and requires a serious analysis of the evidence on record, knowing that the standard of proof is beyond reasonable doubt. In dealing with this aspect, the trial Magistrate stated: "On whether the accused was properly identified, the victim knows the accused as he used to come to their house as a relative. Even when asked to show where is Shaban she managed to show them he is in the rest house". [Emphasis added] With due respect to the learned Trial Magistrate, I hesitate to share her line of argument. Firstly, I am mindful of the position of the law under section 62(1) of the Evidence Act, [Cap 6 R.E 2022] that oral evidence must, always be direct. In this case, there was no direct evidence adduced to prove that it is the appellant, and none but him, who penetrated the victim's anus. All the evidence adduced by the prosecution witnesses mentioned the appellant by way of hearsay, being told so by the victim who never testified. 15 Having gone through the entire evidence, it is clear to me that the best evidence is that of the appellant himself vide his cautioned statement (exhibit P2). In Jumanne Ahmed Chivinja & Another vs. Republic, Criminal Appeal No. 371 of 2019, CAT, DSM, the Court of Appeal stated, at page 10 of the typed Judgment of the Court thus: "It has long been settled that a person who confess to a crime is the best witness, a position taken by the Court in many of its decisions such as D P P vs. N u r u G u l a m r a s u l [1988] TLR 82 cited in D i a m o n M a l e k e l a @ M a u n g a y a vs. R e p u b l i c ...". In this case, the appellant retracted his confession and an inquiry was conducted by the trial court to establish the voluntariness of the same. Having carefully read the cautioned statement of the appellant (Exhibit P2.) in light of evidence of PW5 and PW6 on the manner the inquiry was conducted, I am satisfied that the recording of the said cautioned statement fully observed the applicable conditions set under section 57 of the Criminal Procedure Act, cumulatively. Ms. Tenge urged the court to accord due weight to exhibit P2 because it was recorded in the presence of Iddy Hamis Suleman (PW5) who was chosen by the appellant himself to witness its recording. I agree with the 16 learned State Attorney because the evidence adduced by PW5 gave credence to this assertion. PW5 testified that while he was outside the Police station, he was called in by PW6 F8 D/SSGT Dominic Lukigo Mayala, at the instance of the appellant, so as to witness the recording of the appellant's cautioned Statement. I have painstakingly re-examined the evidence of PW5 and evaluated its weight. It is convincing to note that PW5 is a maternal uncle to the appellant and is probably the person who was very close to the appellant in many respects, including the making of bricks. It will be recalled that the appellant's defence is that this case was framed up against him because his two uncles, namely Ramadhan Hamis (PW2) (the victim's father) and Iddy Hamis (PW5) sought to escape their indebtedness to him from his payment for making them some bricks. PW5 credibly testified that he worked together with the appellant in making the bricks. That, they were both paid money for that work with the appellant being paid TZS 50,000/- which he spent for drinking on the same day save TZS 5,000/- which was found in his pocket when PW5 and others were called to pick him up from the bar. In law, the appellant's behaviour is immaterial in establishing his guilt. However, the above detailed testimony of PW5 helps to impress on the court 17 how he knew and cared about the appellant, which translates to his reliability as a

witness. In his further testimony, PW5 refuted being indebted to the appellant save for some money he was given for purpose of buying him maize seeds. Therefore, PW5 is simply a witness who can be relied upon by the court. In *Ngasa Sita @ Mabundu v. Republic*, Criminal Appeal No. 254 of 2017, CAT at Shinyanga, on page 25 of the typed judgment of the Court of Appeal, it is stated: "It is settled law that, an oral confession made by a suspect, before or in the presence of reliable witness, be they civilian or not, may be sufficient by itself to found conviction against the suspect". [Emphasis added] There is a plethora of decisions to the effect that a properly procured confession, as it is the case here, is reliable evidence based on which the court can proceed to convict. (See, for example; *Isaya Athanas vs Republic*, Criminal Appeal No.435 of 2021). The court is mindful of the position of the law stated by the Court of Appeal in *Rhino Migere vs. Republic*, Criminal Appeal No 122 of 2002 (unreported), thus; 18 "...for a statement to qualify for a confession it must contain the admission of all the ingredients of the offence charged as provided for under section 3(c) of the Evidence Act, 1967..." According to exhibit P2, the appellant stated that, when he was in the guest room, the victim and one Arafat s/o Iddy came into the room. Therein the victim undressed with intention to urinate where upon the appellant got sexual urge and laid her down, applied saliva on her penis and forcefully inserted the same into the victim's anus until he ejaculated. Such an act of penetrating into the anus of a child, whose age has been established to be a tender age, obviously constituted the offence as charged. It is the position of the law that a retracted confession cannot form the basis of conviction without corroboration. (See: *Janta Joseph Komba & 3 Others vs. Republic*, Criminal Appeal No. 95 of 2006, CAT at DSM, on page 10 of the typed judgment). In the instant case, the confessional evidence was duly corroborated by the testimonies of PW1, PW3, PW4 and PW5 who found MR crying, with feces and blood stains from her anus. They also testified that they heard the victim mentioning Shaban as the culprit. PW2 and PW5 testified that the appellant was found inside the house sleeping having been so mentioned by the victim. 19 The narrative in the said Exhibit P2 explains clearly what transpired and, irresistibly points to the appellant as the perpetrator of the crime. With this finding, the appellant's lamentations in the third and fourth grounds of appeal find no accommodation in my mind. The said grounds are rejected for lacking in merits. As for the appellant's defence, on one hand he laments that he was framed up in this case because of the debt PW2 and PW5 owe him. On the other hand, he pleaded alibi, that is, he was not at the crime scene on the material date. The trial Magistrate duly considered this defence and she was not moved. Having read the proceedings and judgement, I cannot fault her. As for the debt, PW5 conceded making bricks with the appellant but denied any such indebtedness. He also conceded to have received TZS 10,000/- from the appellant for purpose of buying him some maize seeds, a reason the appellant came to visit him on that fateful day. On his side, PW2 never testified about being indebted to the appellant, at all. Therefore, in absence of any proof of the debt, the appellant's claim is neither here nor there. And, in such circumstance, to associate the offence with the alleged indebtedness of the victim's farther, who also happens to be a maternal uncle to the appellant, is in my opinion, far-fetched and unreliable defence. 20 Likewise, the appellant's defence of alibi, in the midst of credible evidence by PW2, PW3,

PW4, PW5 and PW6 that he was found in the guest room at the scene of crime, would not settle in anyone's mind. Besides, the appellant (DW1), resorted to a defence of a lib i without giving a prior notice as required by section 194(4) of the Criminal Procedure Act, [Cap 20 R.E 2022], which states: - "(4) Where an accused person intends to rely upon an a lib i in his defence, he sh all give to the court and the prosecution notice o f his intention to rely on such defence before the hearing o f the case. In the end, the appeal is dismissed for lack of merit. Both the conviction and sentence meted out by the trial court are upheld. Dated at Dodoma this 13th day of December, 2024. ABDI S. KAGOMBA JUDGE 21

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