

TANZANIA / JUDGMENT

SHABANI ISSA MANJA Vs

COURT
TANZLIIDECIDED
25 November 2024

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IN THE HIGH COURT OF TANZANIA (DODOMA SUB REGISTRY) AT DODOMA DC CRIMINAL
APPEAL NO. 23488 OF 2024 (Arising from the decision of the District Court of Kondoa at Kondoa
dated 29/02/2024 in Criminal Case No. 39078 of 2023 before F. A. Kahamba, SRM) SHABANI ISSA
@ MANJA.....APPELLANT VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 25th November, 2024 Date of Judgment: 21st February, 2025 E. E. KAKOLAKI, J
In this first appeal the Court is moved to overturn the decision of the District Court of Kondoa
delivered on 29/02/2024, that found the appellant guilty of the offence of Unnatural Offence;
contrary to section 154(1)(a) and (2) of the Penal Code, [Cap 16 R.E 2022] as charged, convicted
and sentenced him to life imprisonment. The appellant has demonstrated his grievances in ten
grounds of appeal as reduced hereunder: 1

1. THAT, your honor Judge the learned trial Magistrate grossly erred in law and fact when convicted an accused person (appellant) while the prosecution side failed to prove the case against the appellant beyond all reasonable doubts.
2. THAT, your honor Judge the learned trial Magistrate erred in law and fact by failing to assess the credibility of the prosecution witnesses hence arising at the wrong verdict against the appellant.
3. THAT, your honor Judge the learned trial Magistrate grossly erred in law and fact by failing to comply with the provision of section 10(3) & 9(3) both of the C.P.A (Cap. 20 R.E 2022) as this enable the prosecution side to pirate the Court and vaguely inject its witnesses then build up its case from the case already heard in Court.
4. THAT, your honor Judge the learned trial Magistrate grossly erred in law and fact by failing to notice that the evidence given by PW4 (Doctor) was questionable due to the fact that he failed to clarify further what was forcefully penetrated into the victim's anus whether it was a blunt object or a stiff body flesh as it has to stand by the law.

5. THAT, your honor Judge the learned trial Magistrate grossly erred in law and fact by failing to warn himself about the evidence of the witness with interest to serve has to be corroborated first.
6. THAT, your honor Judge the learned trial Magistrate grossly erred in law fact by failing to notice that it was evident by the prosecution witness that the incident occurred on 26/11/2023 but without any justified reasonable cause the victim examined on 27/11/2023 (S/C). 2
7. That, your honor Judge, the learned trial Magistrate grossly erred in law and fact by failing to notice that the case against the appellant was cooked and fabricated one due to fact that time of commission of offence is of utmost important to be considered and time for which the victims were taken for medical examination.
8. That, your honor Judge, the learned trial Magistrate grossly erred in law and fact by holding that the appellant was positively identified of which prosecution witnesses failed to give out the detailed description of the alleged culprit as required by law.
9. That, your honor Judge, the learned trial magistrate grossly erred in law and fact by failing to consider appellant defense and erroneously held that the prosecution proved the case against the appellant beyond reasonable doubt while undermining the appellant's evidences.
10. THAT, your honor Judge, the trial Court Judgment was therefore illegal due to the fact that after the learned Magistrate convicted the appellant without giving him a chance for mitigation contrary to the procedure of the law. At the hearing the appellant appeared in person unrepresented while the respondent serviced by Mr. Gothard Mwingira and Ms. Jackline Manyala, learned State Attorneys. Both parties were heard viva voce. When the appellant was invited to argue his appeal, he prayed the court to consider his grounds of appeal and allow the appeal by quashing his conviction and set aside the sentence meted on him on the ground that the same were 3 self-explanatory. He however later on entered his rejoinder submission after the reply submission by the respondent. After considering all the grounds of appeal as well as parties' contending submission, I wish to start addressing the 10th ground of appeal in which the appellant's grievances are centred on the legality of the judgement following denial of the right to be heard i.e. entering his mitigation before his sentence could be entered by the trial court. In her response Ms. Manyala implored the Court to find the complaint misleading as at page 20 of the typed proceedings it is clearly indicated that the appellant was given a chance to mitigate and utilised it. She therefore prayed the appellant's assertion to be disregarded and that this appeal be dismissed by upholding the lower court's decision. In rejoinder the appellant had nothing material to add. Having considered the above submission and gone through the impugned judgment as well as the trial Court record the issue for determination by this Court whether appellant was denied with an opportunity to enter his mitigation and if so, what is the legal effect. Mitigation is simply defined as the term process or result of making something less severe, dangerous, painful, harsh or damaging. See <https://www.meriam.webster.com>. In law

mitigation of punishment is defined by the Black's Law Dictionary, by Bryan A. Garner, 4 8th Edition page 1024, to mean a reduction in punishment due to mitigating circumstances that reduce the criminal's level of culpability such as the existence of no prior convictions. It is a pre-sentencing procedure whereby the convicted accused person and prosecutor are given an opportunity to provide the Court with an account on aggravating or mitigating factors as the case may be. In some circumstances the court may require any other relevant information from other stakeholders such as probation officers and social welfare officers. It is therefore a process where the accused persons are availed with the right to be heard by the Court after conviction and before the sentence is pronounced against him. The importance of the availing the convicted accused person with the right to be heard before and order or sentence is entered against him has been given emphasis by the Court as its violation leads to breach of natural justice the right to be heard being one of them. For instance, the Court in the case of William Frank Haining and 2 Others Vs. R (1972) HCD 53 speaking through Duffus, P. Lutta and Mustafa, JJ. A and deliberating on the subject matter had the following observation to make: "...It is essential here that these persons and more especially the convicted person should be called upon to show cause why and order should not be made. To do otherwise would be a breach of natural justice and would amount to a person being condemned without having a hearing. The necessity for this to be done would appear from the facts in the case ..." From the above cited case it is settled legal stance now that, the accused person convicted with any offence has a right to provide the Court with the mitigation factors for its consideration before any sentence or order is passed against him. The trial Court is therefore legally bound to avail the accused person and prosecution with that right to state mitigation factors and antecedents before any sentence is entered against such accused regardless of whether the said mitigation factors and antecedents would affect the sentence or not if considered by the trial Court. The Court has been treating mercilessly interfering with the sentence arrived at without consideration antecedents and mitigation factors. See for example the cases of Charles Mashimba Vs. R, Criminal Appeal No. 86 of 2002, Raphael Peter Mwita Vs. R, Criminal Appeal No. 224 of 2016 (CAT-unreported). Now back to the issue raised above, unlike what is submitted by Ms. Manyala, it is conspicuously seen from the impugned judgment that, the appellant was sentence without having availed with right or an opportunity of being heard on his mitigation factors. For avoidance of doubt this is what the trial magistrate stated in the typed judgment at page 13 as there is no had written judgement: 6 " In view of circumstances therefore, I find the accused person guilty of the offence that he stands charged and deserves to be convicted and sentenced to serve a life imprisonment as I hereby do under the provision section 154(1)(a) and (2) of the Penal Code [Cap. 16 R.E 2022]. Dated at Kondoia this 29th day of February 2024. F.A. Kahamba, SRM 29.02.2024" As per the lower court record the judgment was pronounced in court on 29/02/2024 before the appellant/accused person and the prosecutor. From the above excerpt of the judgment there is no doubt that sentence was pronounced to the appellant conjunctively with his conviction. Assume for the sake of argument the trial court availed him with the right to enter his mitigation as submitted by Ms. Manyala, still I would not buy her proposition that appellant's complaint

should be disregarded for one good reason that, it would be meaningless to hear the mitigation factors from the accused person who is already convicted and sentenced as it does not feature anywhere in the record that if so provided to the court by the appellant the mitigation factors were considered which is the mandatory requirement of the law as stated in number 7 of cases. See the cases of Bernadeta Paul Vs. R [1992] TLR 97 and Mussa Ally Yusufu Vs. R, Criminal Appeal No. 72 of 2006 (CAT-unreported). Now with the above findings, what is the legal effect of not availing the appellant with the right to mitigation? As found herein above as matter of right the trial Court was duty bound to avail the appellant with an opportunity to mitigate his sentence before the sentence is entered. Much as his conviction was combined with sentence after denial of the right to enter his mitigation, the omission I find vitiated the judgment as the two actions ought to be treated separately. The 10th ground of appeal therefore is meritorious and has the effect of disposing of the appeal hence no need of addressing the rest of the grounds of appeal. In view of the above this appeal is allowed as I hereby quash and set aside the vitiated judgment and the orders thereto. In lieu thereof I order for a fresh judgment to be composed by the trial magistrate adhering to the known procedures after its delivery, should appellant's conviction be maintained. In the meantime, the appellant shall remain in custody awaiting for execution of Court orders. Order accordingly. 8 Dated at Dodoma this 21st day of February, 2025. E. E. KAKOLAKI JUGDE 21/02/2025. Court: The Judgment has been delivered at Dodoma today on 21 st day of February, 2025, in the presence of the appellant in person, Ms. Fatuma Mgunya, State Attorney for the Respondent and Ms. Veradina Matikila, Court clerk. Right of appeal explained. E. E. KAKOLAKI JUGDE 21/02/2025. 9

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