

TANZANIA / JUDGMENT

# WILLIAM MONGO KASUKU

## CRIMINAL APPEAL 130 OF 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF SHINYANGA AT SHINYANGA CRIMINAL APPEAL NO. 130 OF 2023 WILLIAM MONGO @ KASUKU ..... APPELLANT VERSUS REPUBLIC .....  
RESPONDENT [Appeal from the Decision of District Court of Itilima at Itilima.] (Hon. R.P. Kaanwa SRM) dated the 11th day of September, 2023 in Criminal Case No. 32 of 2023

### JUDGMENT

7th & 19th June, 2024. S.M. KULITA, J. This is an appeal from Itilima District Court. The appellant herein, namely WILLIAM MONGO @ KASUKU, was convicted and sentenced to 30 (thirty) years imprisonment for “Unnatural Offence” contrary to section 154(1)(b) of the Penal Code [Cap 16 RE 2022]. 1 It is alleged in the facts of the case that on 14th July, 2023, at Nangale Village within Itilima District, in Simiyu Region, the Appellant herein had carnal knowledge with one Nkamba d/o Dalali against order of nature. Aggrieved with both conviction and sentence, the Appellant herein preferred this appeal relying on the following six grounds as summarized from the Petition and the Supplementary grounds of Appeal as follows;

1. That, the trial court was wrong to accept the hypothetical evidence of the prosecution witnesses while the case was just framed.
2. That, the matter is alleged to have been reported to the Hamlet Chairperson but the said person was not called to testify before the trial court.
3. There was no independent witness called during trial by the Prosecution to prove on the matter.
4. That, the case at the trial court was not proved beyond all reasonable doubts.
5. That, the trial court convicted the appellant relying on the defective caution statement.

6. That, the trial Magistrate convicted the Appellant on shifting the burden of proof to the Accused Person (appellant herein). 2 During the hearing of appeal, Ms. Rose Kimaro, State Attorney, appeared for the Respondent, while the appellant appeared in person. In his submission in support of appeal, the Appellant prayed for the contents of his Petition of Appeal to be adopted as the submissions for his appeal. He also prayed for the appeal to be allowed, hence acquitted. In her reply thereto, particularly on the proof of the case and the validity of the Appellant's caution statement, the Respondent's Counsel, Ms. Rose Kimaro, State Attorney, submitted that the case at the subordinate court was proved beyond all reasonable doubts. She averred that, it is in the record and undisputable that the Appellant (DW1) and the victim (PW1) were lovers. The counsel further submitted that, on 4/7/2022 while the two were on the way to the Appellant's parents for discussion on the issue of marriage between them, PW1 informed the Appellant that by then she already had two children. The Counsel submitted that, the said information angered the Appellant, he thus took PW1 to the nearby farm, he sodomized her and left. The counsel went on to submit that, PW1 went to report the matter to the Hamlet Chairperson for Nangale. She said that the Appellant was thus arrested by Sungusungu militia. He was taken to the Police Station where he 3 admitted to have committed the offence. The Counsel further stated that the victim was given the PF3 for medical examination and upon the examination being conducted it was revealed that the victim's anus was penetrated with a blunt object. As for the Caution Statement, the State Attorney admitted that the same is defective for lacking the author's/Accused's certification clause. She thus prayed for this court to expunge it from the record. She however added that the said expunge does not demolish the prosecution evidence adduced during trial. She said that, still the remaining evidence adduced thereat is sufficient to convict the Appellant for the offence charged. Submissions for the said two grounds had not been rejoined by the Appellant. In my collective analysis on the parties' submissions in respect of those two grounds, I have the following observations; According to the PF3 that had been filled by PW3, as well as his oral testimony before the court, bruises were observed in the victim's (PW1's) anus, which means that penetration was there at that part of her body. The issue is whether the said penetration had been made by the Appellant's 4 sexual organ. Basically, penetration that may cause bruises in the vagina or anus is any blunt object, like a penis. This is according to the experience that I have in attending Rape cases. In this matter, the evidence transpires that the victim (PW1) was medically examined on 5/7/2022 at about 1100 hours, but the said incident of Sodomy is alleged to have been committed on 4/7/2022 at the morning hours. Apart from saying that she reported the matter to the Hamlet Chairman, then to the Police Station, PW1 never stated that she then went or was taken to hospital. But, the testimony of the Doctor (PW3) who examined her at Itilima District Hospital indicates that the Victim (PW1) appeared before him and that he actually examined her on 5/7/2022. The said witness observed that, there was penetration in the PW1's anus. The question now is whether the said penetration was done by the Appellant's penis. The record transpires that the appellant never attended the hospital on the same date, 4/7/2022, when the incident of sodomy is alleged to have been committed. As well, there are no reasons in the record for that. This creates a doubt that, possibly the

Appellant had been using the said time to find the evidence that could incriminate the appellant for Unnatural Offence. One can argue that PW1 had been using the said period of time to find a man for 5 sodomizing her or making penetration into her anus by using any other blunt object, in order to facilitate the accusation against the appellant. Further, be it noted that, it is in the record that, this case arose immediately after PW1 and the Appellant herein (DW1) got into love conflict, whereby the Appellant decided to vacate his promise to marry PW1 after he had noticed that the said PW1 had already taken births before. That, she already had two children. That makes me to come with a conclusive finding that, the whole incident was a revenge by PW1 against the Appellant herein for his denial to marry her. Another thing that I can comment on the strength of the Prosecution case at the trial court is that, the testimony of PW2, a Police Officer at Nanga Police Station is unworthy of credit. According to PW2, the Accused person confessed before him to have committed the alleged crime, hence he noted down his caution statement. In her submission before this court, the State Attorney rightly prayed for the said witnesses' caution statement to be expunged as the same lacks certification of the Recording Officer. On my side, upon going through the trial court's proceedings, particularly on the testimonies of PW2, the one who had sought for and actually tendered 6 the said caution statement to the trial court, I have noticed at pages No. 7 – 8 of the typed proceedings of the lower court record, that the Accused person (Appellant herein) retracted/repudiated the said confession statement, that, it was not authored by him, but the trial Magistrate admitted it as exhibit without conducting inquiry. That was fatal. However, the fact that the said document is defective ab initial in the eyes of law as suggested by the Respondent's counsel and so agreed by this court, it is hereby expunged from the court's record. The above findings are sufficient to declare this appeal meritorious. It is vivid that the case at the trial court was not proved beyond reasonable doubts. In upshot, the appeal is hereby allowed. The Appellant should be released from the prison custody, unless he is held for any other lawful cause. S.M. KULITA JUDGE 19/06/2024 DATED at SHINYANGA this 19th day of June, 2024. 7 S.M. KULITA JUDGE 19/06/2024 8

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