IN THE DISTRICT COURT OF NJOMBE

AT NJOMBE

CRIMINAL CASE NO. 66 OF 2023

REPUBLIC

VERSUS

1. STANNY S/O JOSEPH KOMU
2. JOSHUA S/O LENZORI TAYIYO

1ST AND THE 2ND ACCUSED FINAL SUBMISSION

(Before HON. KAYOMBO - SRM Pursuant to Court Order Dated 08/04/2024)

Your Honour,

The accused person is charged with the offence of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code Cap 16 [R: E 2022] of the law of Tanzania mainland. According to the charge sheet the accused person on unknown date of 1st March, 2023 to 30th April, 2023 at YAKUBI area within the District and the Region of Njombe, alleged to have Carnal Knowledge of one ALFA S/O SADRO MWALONGO a boy of 14 years old.

Your Honour

Before going very far it's better to remind your honorable court that the accused persons are charged with a momentous offence and if it proved by the prosecution it amounts to capital punishment. From that angle we invite your honorable court to consider the well-known Principal of Criminal Justice across the Commonwealth that the Prosecution has a burden of proving their case Beyond Reasonable Doubt. **However,** where the Prosecution fails to prove its case beyond Reasonable doubt the charge must be dismissed and the accused should be set to liberty as it is the blessing from the recent decision in the case of **DIRECTOR OF PUBLIC PROSECUTION VS SHISHIR SHYAMSINGH CRIMINAL APPEAL NO. 141 OF 2021 CAT** Whereas **WAMBALI J.A** at his typed judgment paper page 17 was of the opinion that;

> "We must emphasize that in criminal trial the prosecution is bound to prove the case beyond reasonable doubt instead of shifting the burden of proof to the accused, as it seems apparent in the case at hand. In **Fakihi**

Ismail v. The Republic, Criminal Appeal No. 146 "B" of 2019 (ureported), the Court stated that:

> *"It is elementary that the burden of proof in criminal cases rests squarely on the prosecution with no requirement that the accused proves his innocence, and that such proof must be beyond reasonable doubt - see the cases. of* ***Joseph John Makune v. The Republic*** *[1986] T.L.R. 44 and* ***Mohamed Said tyatulay.. The Republic*** *[1995] TLR 3)."*

Your Honour,
The evidence adduced by the prosecution side is bursting of contradictions, Discrepancies, Inconsistence of the Witnesses and mainly the charge sheet is incurable defective which vitiate prosecution case.

Your Honour,
By Starting with the testimony of witness PWI, SADRO AMOS MWALONGO and PW2 one CLEMENCE ALOYCE CHALAMILA, PW3 IGNAS OSCAR MUGONGO, PW4, EDITHA JOHN and PW6 G.8386D/CPL ENDREW their testimonies were full of hearsay evidence as it is inadmissible and incapable of convicting an accused person as it is the settled position of the law in the case of **RAMSON PETER ONDILE VS THE REPUBLIC CRIMINAL APPEAL NO. 84 OF 2021 CAT** Whereas **KWARIKO J.A** at page 12 of his typed judgment had this to say;

> *"Having discarded the evidence of PW2, the question which follows now is whether the remaining evidence on record is capable of sustaining the appellant's conviction.* ***Starting with PW1, her evidence is hearsay, having been informed by the victim that the appellant had sexually assaulted her. It is trite law that, hearsay evidence is incapable of grounding a conviction****. As for PW3, what she did is to peruse the case file by reading witnesses and victim's statements and forwarded it to the higher authority for action. According to her, the appellant had already been interrogated. However, she did not even say what the appellant said upon arrest for these allegations. Lastly,* ***the doctor (PW4) only established that the victim was sexually assaulted but did not prove who the perpetrator was."***

Basing on the above position from the Higher Court of Records it is crystal clear that the hearsay evidence is inadmissible and incapable of convicting an accused persons as the witnesses mentioned above from the records states that they hear but they do not observe by their eyes the offence was committed for example PW1 states he had from the Victim, PW2 hear from PW 5, and PW4 heard the same from PW2 thus generally was the hearsay evidence which could not convict the accused person on the alleged committed offence. Therefore, for the reasons

stated we humbly pray to acquit and set the accused persons free at liberty as the prosecution has failed to prove their case beyond reasonable doubt.

Your Honour,
The same quoted paragraph above in the case of **RAMSON PETER ONDILE (SUPRA)** it is clear from the proceedings that PW7 testified as the Doctor from Kibena Hospital who admitted PW5 (Victim) in the hospital and heard his complain and made an investigation by looking the victim in the anus later he recorded that the victim should have laboratory checkup (as done by another person) and **the report came again to him that the victim has bruises (michubuko) and muscle prolapse (misuli kulegea)** and using the report from the laboratory he fill the PF3 form. It came to the mind of any prudent man that the prosecution has failed to prove the case beyond reasonable doubts for the reason that, **firstly** the witness PW7 failed to establish that there was a penetration of a male organ (specifically of the accused persons) **secondly,** failed to establish how the accused is associated with the bruises and muscle prolapse in the victim's anus and lastly if the witness have examined that the victim had carnal knowledge he ought to establish who is the perpetrator of such action against the order of nature?

Your Honour,
From the above the prosecution have failed to prove their case beyond reasonable doubt as they rely on hearsay evidence and incompetent witness since the **one who examine the victim in the laboratory was someone else in the labolatory and not the PW7 who came to testify before your honourable court, whereas the important witness to testify was the one who examined the victim in the laboratory who was in a better position to explain what transpired after the examination of the victim** thus prosecution failure to bring such important witness to testify before the court creates doubts as the witness could come and testify otherwise thus this draws cross inference to the prosecution as it is well settled position in the case of **RAPHAEL MHANDO VS REPUBLIC CRIMINAL APPEAL NO. 54 OF 2017 CAT** where **MKUYE J.A** subscribed the case of **Boniface Kundakira Tarimo vs Republic, Criminal No. 351 of 2008** at page 9&10 of this typed judgment that;

> *"It is thus now settled law that where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse*

inference may be drawn against that party, even if such interference is only a permissible one."

Your Honour,

It is inexcusable for the prosecution failure to call such an important witness who examined the victim in the hospital raises doubt and draws cross inference to the prosecution case thus failed to prove their case beyond reasonable doubts. Therefore, we pray the accused persons be acquitted and set at liberty.

Your Honour,

The particulars of the offence in the charge sheet and the evidence adduced by prosecution witnesses was full of contradictions and discrepancies which creates doubt to the prosecution case and the same it is the settled position that contradiction of the evidence of the witness is the good reason for the court to disbelieve the witnesses and the evidence become the improbable evidence as it is in the case of **TUMAIN FRANK ABRAHAM VS REPUBLIC CRIMINAL APPEAL NO. 40 OF 2020 CAT** Where **RUMANYIKA J.A** at page 12, 13 and 14 of his judgment delivered that;

"We thus, find her evidence to be improbable and inconceivable because, on that aspect her oral evidence is materially inconsistent with the particulars of the offence narrated in the charge evidence. ***We find the above contradiction in the victim's evidence to be fundamental thus a good reason for the Court to disbelieve her.*** *Saying so, we are fortified with the Court's previous decisions including one in the case of* ***Mathias Bundala v. R,*** *Criminal Appeal No. 62 of 2004 (unreported) which we quoted in* ***Toyidoto Kosima*** *(supra) observing as follows:*

" Good reasons for not believing a witness include the fact that the witness has given improbable evidence, or the evidence has been materially contradicted by another witness or witnesses". Equally, we are aware of the settled principle of law that, in any judicial criminal proceedings, where oral testimonies by the prosecution's witnesses become inconsistent and incompatible with the particulars of the offence charged as indicated above thereby going to the root of the case, that inconsistence renders the prosecution case to be shaky and bound to fail for being deficient of proof beyond reasonable doubt"

Your Honour,

From the above observation and the case at hand it is clear that during hearing the charge and facts was ready to the accused persons and states that the victim reported the matter to the Second Master on **27th July**

2023, when the witnesses testify before the court especially PW2 and PW4 testified that on **25th July 2023** the victim reported the matter to him when he was in the laboratory something which raises doubts on the different dates mentioned, thus the court will remain on the dilemma as to who should believe. Again PW5 testified before the court that after the 1st accused was shifted to another school on 14/07/2023 came to the school to say goodbye and on such day had carnal knowledge with the victim but coming back to the charge sheet states that the offence was committed on diverse date between **1st march 2023** to **30th April 2023 on** which the dates contradicts with the charge sheet. Therefore, it is our humble prayer the accused persons be acquitted and set free at liberty as the prosecution evidence was contradictory thus the prosecutions witnesses should not be believed.

Your Honour,

The same it is observed that in the charge sheet states that the offence was committed on diverse dates from **1st march 2023** to **30th April 2023** while both witnesses when testifying before your honorable court have failed to establish those dates exactly that the offence was alleged to have been committed something which creates doubts to the prosecution's case as it is the celebrated position in the case of **KASSIM ARIMU @ MBAWALA VS THE REPUBLIC CRIMINAL APPEAL NO. 607 OF 2021 CAT** whereas **MKUYE J.A** in his typed judgment page 8&9 was of the view that;

> *"Having regard to the totality of the evidence on record, we are settled that the prosecution failed to prove the allegation in the charge in respect of the date of the incident. At this juncture, we wish to reiterate what the Court stated in* ***Mathias s/o Samwel v. The Republic,*** *Criminal Appeal, No. 271 8 of 2009 which was also referred in* ***Salum Rashid Chitende v. The Republic****, Criminal Appeal no. 204 of 2015 (both unreported) thus:*
>
> > *"When specific date; time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place."*

Your Honour,

The prosecution have failed to establish the specific dates the offence was committed, based on the above observation and come to our case at hand the prosecution has mentioned the diverse dates between **1st march 2023**

to **30th April 2023** the offence was committed but throughout prosecution of their case have failed to prove and establish those diverse dates alleged the offence was committed something which creates doubts to the prosecution's case thus draws cross inference to their case and raises doubts hence they have failed to prove their case beyond reasonable doubt. Therefore, it is our humble prayer the accused persons be acquitted and set at liberty.

Your Honour,
The charge sheet is incurable defective which vitiate prosecution case is that, according to Section 132 of Criminal Procedure Act, Cap 20 [RE 2022] provides that the charge sheet shall disclose the essential elements of the offence to the accused person. It goes further and state that the charge sheet shall contain statement of the specific offence that the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.

Your Honour,
As we go through the charge sheet it was stated that an offence of unnatural offence was committed on diverse date from 1st March to 30th April 2013 contrary to the prosecution evidence of PW5 who testified that the accused persons had carnal knowledge with him. It is clear that the word "diverse dates" as stated in the charge means that is more than a single day. If the prosecution meant the offence was committed more than once the victim could remember even a date of a single day among those dates the offence alleged to have been committed thus draws cross inference and creates doubts to the prosecution's case.

Your Honour
The victim's failure to report and name the accused persons at the earliest opportunity creates doubts to the prosecution case, it is now a trite law that failure to report and name the suspect at the earliest possible opportunity vitiates the credibility of the witness. This principal is not new in the big farm of administration of justice. Once upon a time the court of appeal in Tanzania was encountered with a similar case of rape whereby the victim failed to report and name the suspect at the earliest possible opportunity in the case of **AHMED SAID VS REPUBLIC, CRIMINAL APPEAL NO 291 0F 2015 (CAT) (Unreported)** at page 14 of the typed judgment subscribing the case of **WANGITI MANSA &OTHERS VS REPUBLIC** the court held that,

"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court into inquiry"

The same was well settled position in the case of **MPEMBA JOSEPH VS THE REPUBLIC CRIMINAL APPEAL NO. 420 OF 2019 CAT** Where **MAKUNGU J.A** at page 10 of the judgment was of the position that;

*"Furthermore, a similar situation confronted the Court in the case of **Yust La la v. The Republic**, Criminal Appeal No. 337 of 2015 (unreported), it stated that:*

"... In our considered view, the lapse of time between the alleged rape and the time when the appellant was mentioned raises doubt on the credibility of PW1. It was her evidence that she did not mention the appellant for all that period because of his threat that he would slaughter her if she disclosed to anybody that he raped her. Since she was not staying with appellant, we find it doubtful that with such a serious offence, she would for all that period fail to tell her mother about it "

Your Honour,

In the case at hand the victim alleged that the accused have committed the offence on diverse dates from 1st march 2023 to 30th April 2023 whereas the victim alleged to have reported the matter on contradictory dates of 25th July 2023 and 27th July 2023 to the PW1 thus was very late for any unknown reason even though the victim testified that was threatened by the accused persons but as the victim was not at any time staying with the accused person since **he went home for leave in June he had a chance or opportunity to report the matter to her mother or father as his parents or anywhere else even the Police but the victim do not act the same thus under this circumstances the lapse of time more than three months in reporting and naming the accused person raises doubts on the credibility of the witness PW5 (victim)** the same the victim PW5 Testified before the court that he transferred school not because of the threats from the accused but for the reason that the school does not teach. Under this circumstances the evidence adduced by PW5 was not worth for this honourable court to believe since creates a lot of doubts to the prosecution case which should be resolved on behalf of accused persons. Thus it is our humble prayer that the accused be acquitted and set free at liberty.

Your Honour,

The charge sheet states that the offence was committed on diverse dates from **1st March 2023** to **30th April 2023** and the witnesses testified that the matter was reported by the victim on contradictory dates between 25th and 27 of July 2023 and it is clear that PW6 testified the victim was examined in Hospital on July 2023 which it is clear three months later from the dates offence alleged to have been committed, **we ask our self at this lapse of time more than three months how the doctor examined that there was penetration in the victims's anus?** and how the doctor finds that there are bruises (michubuko) in the victim's anus after the lapse of three months without recovery? This creates doubts to the prosecution case and at this juncture they have failed to prove their case beyond reasonable doubt thus it is our humble prayer that the accused be acquitted and set free at liberty.

Your Honour,

The same in the course of the proceedings the prosecution tendered PF3 as the exhibits dated 27th July 2023 while the offence was alleged to have been committed on diverse dates between 1st March 2023 to 30th April 2023 in which was about three months later under this circumstances it left us with a lot doubts to the prosecution's case.

Your Honour,

The prosecution's case raises doubt due to grudges which existed between accused person and the headmistress who was PW4 Due to personal conflicts that were existing for a long time Which the Accused person during the defense hearing establish that there were conflict which existed and the same it was collaborated by the prosecution witness PW6 when he was cross examined by the defense counsel, the same it is clear that PW4 was the one who took the victim to the Hospital and it is the trite law that when the grudges existed and the prosecution failed to disapprove it renders the prosecution case unproved beyond reasonable doubt as it is the position from the case of **YUST LALA VS REPUBLIC CRIMINAL APPEAL NO. 337 OF 2015 CAT** Where **MWARIJA J.A** at page 10&11 of his judgment was of the opinion that;

> *"These factors combined with the appellant's complaint that he was framed by PW2 due to grudges which existed between them because of a land dispute, raise reasonable doubt on the prosecution's case. We find therefore that had the learned appellate judge considered these factors, she would have found that the evidence of PW1 was doubtfully, the result of which rendered the prosecution case unproved."*

Your Honour;
The same it was collaborated by the Defense witness who is Second Accused one JOSHUA LENZORI TAYIYO that he was instructed by PW4 to write the report as a security guard that he caught the 1ST accused with six students in his room while not true and the 2nd accused refused to act the same. This create grudges again to PW4 hence this case.

Your Honour;
Based on the above it is clear from the proceeding that the prosecution witnesses testified with a lot of inconsistences and contradictions due to the facts that the story was false, cooked and fabricated. Therefore, it is our humble prayer that the accused person be acquitted and set him free at liberty for the reason that the prosecutions have failed to prove their case beyond reasonable doubts.

Your Honour,
This honorable court should take the evidence adduced by PW5 ALFA MWALONGO who is a victim in a bird's eyes since was bursting of contradictions, inconsistence, discrepancies and uncollaborated. At the hearing PW5 testified before the court that he is a liar and several times tell lies to his parents and teachers. Therefore, we ask our self if he managed to tell lies to his parents and teachers, how could he tell the truth before this honorable court while he used to tell lies...?

Your Honour
We are aware that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. In the case at hand the evidence adduced by PW5 was not credible and the court should warn itself on giving weight on it. He tells his parents that the accused person unnatural him seven times at the same time he tells the second master the accused person unnatural him one times and also during cross examination he said that the accused person unnatural him several times. This inconsistence should not be taken in a light way since creates a lot of doubts in the prosecution case.

Your Honour
In the case of **DPP VS SIMON MASHAURI CRIMINAL APPEAL NO. 394 OF 2017** The Court of Appeal Held that

> *"The credibility of witness can be determined in two ways* ***one****, when assessing the coherence of testimony of that witness****. Two,*** *when the*

testimony of that witness his considered in relation to the evidence of other witnesses..."

The same in the case of **MAJALIWA IHEMO VS THE REPUBLIC CRIMINAL APPEAL NO. 197 OF 2020 CAT GALEBA J.A** was of the opinion that,

"In our view, the above narrated scenarios in the evidence of the material witness constitute good and cogent reasons to disbelieve the prosecution evidence, particularly that of PW3 who was the only eye witness. It has also been the position of this court that for a court to base a conviction on the evidence of a sole eye witness, his or her evidence must be absolute watertight ...."

Basing on the observation above it is clear that the victim as the only eye witness he is not credible enough to hold water on the credibility of the key witness thus this creates doubts to the prosecution's case.

Your Honour

The same PW5 testified before the court that on 14th July 2023 the 1st Accused person came to school to say goodbye and had carnal knowledge with the victim but when the prosecution case was heard they did not tender any exhibit as to prove that the 1st accused one STANNY JOSEPH KOMU came to school on the date mentioned above since there are procedures when the guest visit the school such as signing in the reception book, the same they do not tender any exhibit that establish on such date the 1st accused was invited to the school to say goodbye after the 1st accused was shifted to another school.

Your Honour;

The prosecution failed to tender in court the EXHIBITS that the prosecution's witnesses testified in Court that during investigation were taken from the 1st accused person by Police officer, it is clear in the proceedings that the prosecution did not tender syringes, liquids and the like which were alleged by the prosecution witnesses that were taken by police officer during the investigation thus based on that it create doubts to the prosecution's case against the accused persons since if those exhibits were seized by the police why were not tendered before the court?

Your Honour;

We are resting our case by demonstrating the fatal weaknesses in the prosecution case. We have endeavored to point out *how the prosecution evidence is bursting of contradictions,* ***Discrepancies, Inconsistence of the Witnesses and mainly the charge sheet is incurable defective which vitiate prosecution case.*** We are therefore inviting your honourable court to invoke the provisions of section 110 (1) of The **Tanzania Evidence Act no 6 of 1967** read together with the second proviso to section 114 of that law provide that where the Prosecution fails to prove its case beyond Reasonable doubt the charge must be dismissed and the accused should be set to liberty. Also, we invite the eyes of your honorable court to celebrate to gather the decision of Hon. The late Katiti J. in the case of **Jonas Nkize Versus Republic (1192) TLR 213** whereby the court dismissing the charge against the accused persons and release him from the charge and set him to liberty since the prosecution failed to prove its case beyond reasonable doubt as it is in our case at hands.

Your Honour

It is our humble submission and prayer that this Honourable Court to acquit the accused persons and set them free at liberty forthwith since the prosecution have failed to prove their case beyond reasonable doubt.

We humbly submit.

Dated at Moshi this……Day of …… 2024

……

ADVOCATE FOR THE APPELLANT

Presented for filing this……day of……2024

……

REGISTRY OFFICER

DRAWN AND FILED BY

WILHAD A. KITALY
URU ATTORNEYS
KILIMANJARO COMMERCIAL COMPLEX,
FLOOR 2, ROOM NO. 21,
OPPOSITE WITH MOSHI MUNICIPAL OFFICE,
P. O. BOX 8797,
MOSHI-TANZANIA
MOB: 0715419899
Email: uruattorneys@gmail.com

SERVED UPON

State Attorney,
National Prosecution Service – Njombe
P. O. Box ……
Njombe.