IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

HC CRIMINAL APPEAL NO. 134 OF 2013
(From the decision of the Ilala District Court in Cr. Case No. 472 of 2010)

KISWADI SELEMANI ..... **APPELLANT**

Versus

THE REPUBLIC ..... **RESPONDENT**

Date of hearing: 1th September, 2015
Date of Judgment: 11th February, 2015

JUDGMENT

Feleshi, J.:

According to the charge sheet, the appellant was charged before the Ilala District Court with Unnatural offence; Contrary to sections 154 (1) of the Penal [Code, Cap.16,R.E.2002] where it is alleged that he committed the offence against one KAIZA S/O MKUDE, a three years old boy, of which he was consequently convicted and sentenced to life imprisonment.

The respondent through Mr.Costantine Kakula, learned State Attorney did not support the both conviction and sentence basing on two grounds. Firstly, he submitted that the conviction based on the statement of one Haji Makame (Exh.P4) tendered under section 34B (2) of the Evidence Act, [Cap.6 R.E.2002] was improperly admitted. The evidence in Exh.P4 is to the effect that the said Haji Makame who could not be procured to adduce his testimony had seen the appellant on 14/6/2010 coming from the room where the victim was collected from. The learned

State Attorney submitted that Exh.P4 was read in court before its admission. That was contrary to the law. He cited the decision of the Court of Appeal in the case of **Robinson Mwanjisi and 3 others v.Rep.** [2003] TLR 218 where it was held that:

> "(vi) Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same."

He also submitted that the Exh.P4 was not supplied to the appellant before. On that he cited the decision of this Court in **the Director Of Public Prosecution V Ophant Monyancha** [1985] TLR 127 where the court found that the condition laid down under s.34B (2) (d) was not fulfilled in that a copy of the police statement was not served on the accused before the hearing of the case and it held that was clearly wrong and the irregularity was fatal. He thus supported the position held in the two cases.

Secondly, he submitted that the victim of the unnatural offence was not brought in court to identify his assailant upon being subjected to the *voire dire* test. He said in the case of **Hangwa William v.The Rep.,** Criminal Appeal No.117 of 2009 (CA) it was held at page 10 that the evidence of the victim is the primary evidence, the other pieces of evidence could only come in as corroboration. He thus said it was very important for the child to be brought in court and short of doing so left the case empty.

I went through the record. It is true that D.5739 D/SGT Emily (PW.4) tendered the witness's statement after reading it openly in court. Page 15 of the proceedings reads in part:

"The witness was called Haji Makame, I come (sic) to read the Haji statement because the witness is not reached and he doesn't know where he is. I pray to read it in order to be taken as evidence by the court...after reading the witness statement I wish to tender it as exhibit."

Recently, this Court in **Rep v. Adamu Charles Mkude**, Criminal Sessions Case No. 39 of 2012, Dar es Salaam Registry (unreported) acted on evidence of four witnesses who could not be procured but upon satisfying itself that section 34B(2)(a)&(d) of the Evidence Act (supra) as amended by the Written Laws (Miscellaneous Amendments) (NO.2) No. 5 of 2012 was fully complied with by issuance of notice and supplying their statements to the defence before hand.

Now that no notice was issued and the statement of Haji Makame was read over in open court before its admission and was not even served to the accused before hearing what the court can do is to hold that such irregularities were fatal. The consequent effect is one and it is to expunge the evidence contained in Exh.P4. The same is hereby expunged.

I further agree with Mr.Kakula that in the case of this nature the evidence from the victim is of paramount importance. It was for that reason that section 127 of the Evidence Act (supra) was amended and now through its sub-section (7) the court upon being satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth can convict without corroborating evidence. The decision in **Hangwa William** above is therefore authoritative on this requirement.

Dr.Elias Mbando (PW.5) is on record (see. page 19 of the typed proceedings) that the boy whom he examined was five (5) years of age

and not three (3) as indicated in the charge sheet. That, in my unfeigned opinion, was reasonable age for a witness of tender years to appear and help the court in ascertaining key issues of identity and how the *actus reus* of the offence was executed against him on the fateful day. This is very crucial bearing in mind the graveness of both the charge and its sentence. That never happened.

For the foregoing analysis and due to the weakness obtaining on the charge sheet which need not waste my time to discuss, I allow the appeal. I accordingly quash the conviction and set aside the life imprisonment sentence imposed to the appellant. I further order for his immediate release unless if he is otherwise lawfully held.

DATED at DAR ES SALAAM this 11th day of September, 2015.

THE HIGH COURT OF TANZANIA

E.M.FELESHI
JUDGE

Delivered in the presence of the Appellant and Ms.Neema Mbwana, the learned State Attorneys for the Republic, the Respondent. Right of Appeal explained.

E.M.FELESHI
JUDGE
11/9/2014

THE HIGH COURT OF TANZANIA