IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 204 OF 2015
(From Morogoro District Court Criminal Case No. 820 of 2010)

KIBALI SAID LUGENDO ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

Date of Last Order: 12/02/2016
Date of Judgment: 19/02/2016

JUDGMENT

FELESHI, J.:

In the District Court of Morogoro at Morogoro, the appellant was charged with unnatural offence contrary to section 154(1)(a) of the Penal Code, [CAP. 16 R.E, 2002]. It was alleged that, on 3rd day of December, 2010 at about 22:00hrs at Mkindo village within the District and region of Morogoro, the accused did have carnal knowledge of one Faida s/o Faida, a boy of sixteen years old against the order of nature.

The accused pleaded not guilty to the charged offence. He was tried, convicted and sentenced to thirty years imprisonment. Aggrieved by the decision, he has preferred this appeal on eight (8) grounds namely:-

1. **That, the trial Court grossly erred both in law and in fact by considering a repudiated Cautioned Statement Exhibit "P11" tendered by PW4 against the appellant as no inquiry was conducted to determine its validity as well as the unsworn evidence of some witness contrary to mandatory provisions of the Criminal Procedure Act, [CAP. 20 R.E, 2002].**
2. **That, the trial Court grossly erred both in law and in fact by not informing the appellant of his right of summoning the medical person**

alleged to have examined the victim and filled the PF3, that is, Exhibit P1 to test its authenticity in compliance with the mandatory provisions of the Criminal Procedure Act, [CAP. 20 R.E, 2002].

3. **That, the trial Court grossly erred both in law and in fact by failing to assess the contradictory evidence between PW1 and PW2 as to the actual date the appellant was asserted.**
4. **That, the trial Court erred both in law and in fact by not finding the prosecution to have undermined their case for failure to summon the militia who it is alleged to have arrested the appellant at the Village Executive Office where the said crime was first reported.**
5. **That, the trial Court grossly erred both in law and in fact by not drawing an adverse inference against the prosecution case for not having summoned one Athumani who witnessed the appellant picking up PW3 on the fateful date to testify on that material fact as exemplified by the victim to cement their case.**
6. **That, the trial Court erred both in law and in fact by not analyzing the prosecution evidence objectively before relying on it as basis for conviction.**
7. **That, the trial Magistrate grossly erred both in law and in fact by convicting the appellant basing on un-justified corroborated prosecution evidence.**
8. **That, the trial Magistrate erred both in law and in fact by convicting the appellant in a case where the prosecution failed to prove his guilty beyond any speck of doubt as charged.**

The hearing of the appeal was conducted orally. The appellant appeared in person. On the other hand, the Respondent/Republic was represented by Ms. Debora Mcharo, the learned State Attorney. When invited to address the grounds of appeal, the appellant just urged the court to consider his grounds of appeal which to him formed integral part of his submission. He finally, prayed for his appeal to be allowed.

On his part, supporting the appeal, the learned State Attorney submitted that, the Cautioned Statement was admitted against the law as per the decision by the Court of Appeal of Tanzania in the case of **Seleman**

Abdallah & 2 Others vs. Republic, Criminal Appeal No. 384/2008 where it was held that it is improper to admit a contested Cautioned Statement without conducting an inquiry. Moreover, the victim's PF3 was admitted contrary to section 240(3) of the Criminal Procedure Act [CAP. 20 R.E. 2002] as the Court did not inform the accused of his right to have the doctor summoned in Court for examination.

Besides, it was the submission by Ms. Mcharo that, the evidence as a whole was not well evaluated by the trial Court as the court proceedings shows at page 7 that PW1 did not well describe his assailant. Likewise, the said one Athumani who is alleged to have been present when the appellant took him for the commission of the charged offence was not summoned in Court to testify.

Moreover, she added that it was improper for PW3's aunt not to be summoned to testify because she lived with the victim to testify if true that he was unnaturally known by the appellant. Besides, no militia mentioned by PW2 was ever paraded in Court thus leaving the prosecution case dented. It was from the above the learned State Attorney supported the appeal.

Having considered the respective submissions by the appellant and the learned State Attorney together with the Court record, the issue is whether under the circumstance the appeal is maintainable. The following thus are the deliberations of this Court in disposal.

The first observation I am bound to make at the outset is that, both PW1 and PW2 were not eye witnesses. The only eye witness is PW3 (the victim) who testified that the incident occurred on 03/12/2010 at 22:00hrs.

According to the charge sheet which was filed on 23/12/2010, the victim (PW3) was by then aged sixteen (16) years. But by the time PW3 testified in Court on 16/08/2011, he deposed that he was by then aged twelve (12) years of age. The evidence on record shows that, the trial Court "conducted" a *voire dire* test. I have used the word "conducted" purposely because if at all PW3 was by 23/12/2010 of 16 years of age, it is unbecoming that on 16/08/2011, his age declined to be 12 years of age.

Moreover, even by assuming that PW3 was a child of tender years, though there are no prescribed questions which have to be asked in conducting a *voire dire test*, yet, the posed questions by the trial Magistrate were insufficient to establish that the "child" knew the nature of an oath. Besides, nothing is on record to the effect whether the "child" knew the duty to speak the truth. If the above in unison stands as correct position, that renders the evidence by PW3 unreliable at the first place.

This is what was captured by the full Bench of the Court of Appeal of Tanzania in the case of **Kimbute Otiniel vs. The Republic,** Criminal Appeal No. 300 of 2011 (Dar es Salaam Registry), (Unreported) where the Court had the following at pages 80 and 81 of the typed copy of Judgment:-

> **"Moreover, in the absence of confirmation from other supporting evidence, it would be too over-confidential, if not risky for the court to be fully satisfied that a child witness is telling nothing but the truth,**

without having positively found out earlier that he or she even knows the duty of telling the truth".

Furthermore, considering that the incident occurred at night, nothing is on record showing the sequence of events as to how PW3 found himself in the hands of the accused specifically regarding what happened on that material night. Besides, it is true as submitted by both the appellant and the learned State Attorney that the PF3 was not properly admitted by the trial Court, as my reading of the trial Court proceedings leads to a finding that the trial Magistrate was not attentive in recording the evidence and he thus did not adhere to section 240(3) of the Criminal Procedure Act (supra).

Upon conflict regarding the age of PW3 between that mentioned in the charge sheet and the one adduced to the trial Court, the trial Court ought to have ordered the charge sheet to be amended or substituted in terms of section 234 of the Criminal Procedure Act (supra) or conduct an inquiry to ascertain the exact age of the accused under section 113 of the Law of the Child Act, NO 21 of 2009. Failure to do so was, in my respectful opinion fatal. Now, considering the evidence by PW3 without going into the details, it is in the interest of justice to have the matter retried.

Consequently, the proceedings, Judgment and Orders of the trial Court are hereby nullified for being a nullity. Being the case, there is no need to address the remaining grounds of appeal to avoid prejudicing the rights and interests of the parties in the matter under scrutiny. I thus proceed to make order for the matter to be heard ***de novo*** before another Magistrate with competent Jurisdiction to try it. Order accordingly.

E.M. FELESHI
JUDGE
19/02/2016

Judgment delivered in chambers this 19th day of February, 2016 in presence of Ms Debora Mcharo, the learned State Attorney for the Respondent and the Appellant being present in person. Right of appeal is explained.

E.M. FELESHI
JUDGE