**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 231 OF 2017**

(Originating from Ulanga District Court, Criminal Case No. 97/2016)

**ADAM ANGELUS MPONDI.....APPELLANT**

***Versus***

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant above mentioned is appealing against conviction and sentence of life imprisonment meted out to him by the District Court of Ulanga. At a trial court the appellant was charged for an offence of unnatural offence contrary to section 154(1) (a) and (b) of Cap 16 R.E 2002. Four witnesses testified for the prosecution. In essence the prosecution evidence was that on 2/6/2016 at about 11.00hrs, at safari road village in Ulanga District the appellant had committed sodomy that is carnal knowledge of the victim (Shaffii Mkonja) against the order of nature, who sustained bruises on the anus. On the basis of this evidence the trial court found that the prosecution had proved her case beyond reasonable doubt, convicted and sentenced the appellant as aforestated.

The appellant was aggrieved by both conviction and sentence, hence lodged this appeal. The appellant complaints are that: the trial court judgment was procured illegally as he was convicted and sentenced in his

absentia and was not given time to show cause why he was at large; the plea was not taken; the provision of the law charged with was not properly supported by the evidence on record: PW1 and PW2 who are children under tender age were unprocedural allowed to testify; finally, the medical doctor who tendered a PF3 (Exh P1) did not lay down his qualification.

At the hearing of appeal, the appellant had nothing to add in support of his ground of appeal. Responding to the appellants grounds of appeal Mr. Adolf Kissima learned State Attorney, in regard to the first ground of appeal that the appellant was sentenced in absentia on 15/12/2016, the learned State Attorney submitted that on 24/11/2016 the accused ought to appear in court but did not appear including his sureties did not appear to explain his where about. That the trial court exercised it is wisdom and adjourned the matter to 14/12/2016, but still the appellant did not appear hence the court proceeded in his absentia under section 226 CPA, where the medical doctor testified.

The record and proceedings of the trial court shows that on 10/11/2016 when PW1, 2 and 3 had testified, the appellant who was on bail was present and participated a trial, then the matter was adjourned to 24/11/2016 on which the appellant was recorded as absentee and there was no explanation as to his where about. The court adjourned the matter to 12/12/2016 where the accused did not appear and was still at large (meaning that he had abused his bail and absconded) and the prosecutor asked the court to proceed under section 226 CPA, which prayer was granted. It is when PW4 testified and the prosecution closed it is case. The

matter was then scheduled for judgment on 15/12/2016, whereby the appellant was convicted and sentenced in absentia, to life imprisonment.

On 27/12/2016 the accused was brought to court under arrest. The prosecutor addressed the court that the matter is for reading the judgment to the accused, where the accused was recorded to have said "I am ready" then judgment was read over to him by the court. it is my findings that so far the appellant had jumped bail and went at large and so far he was apprehended after the court had issued an arrest warrant, he cannot be heard complaining to have not been given time to show cause why he was at large, as contemplated into his first ground of appeal. To my understanding a scheme of giving time to show cause could only apply to the appellant if the court could had initiated proceedings for forfeiture of recognizance interms of section 160(1) Cap 20 R.E 2002.

In the instant matter the appellant was apprehended after the matter had proceeded and finalized in his absentia under section 226(1) Cap 20 R.E 2002. The procedure of dealing with him is provided for under subsection 2 of section 226 Cap 20 (supra), which provides, I quote,

> *"If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from cause over which he had no control and that he had probable defence on the merit"*

The records of the trial court reveal that when the appellant was brought before the court on 27/12/2016 was given an audience but he did not explain as to why he opted to abuse bail and went at large. Moreover he

was told that the matter was for reading judgment to him, but he said nothing apart from saying he was ready. Indeed one could wonder if the appellant would purport to had have good ground to satisfy the court that he was prevented to attend the proceedings from causes he had no control, while he was brought under arrest! A story could be different if the appellant could had appeared and surrendered himself to court. And if I make a flash back to the trial court proceedings, records shows that on 5/9/2016 his surety (Angelus Francis Mpondi, appellants father) appeared before the trial court and he asked to withdraw from standing as a surety for accused (appellant herein) on explanation that the appellant had attempted to jump bail, escaped, and went to Ifakara where he was arrested and brought back.

The court exercised it is wisdom, just warned the appellant and asked him to look for another surety (presumably his surety was discharged) but accused's bail was extended. The records are silent if the accused had subsequently furnished another surety. But this is not an issue here, as thereafter he went on attending court proceedings, although he later absconded as aforesaid. I will revamp to the first ground later.

The second ground is that a plea was not taken. Responding to this ground, Mr. Kisima learned State Attorney submitted that on 6/6/2016 a charge was read over to the appellant but his plea was not recorded. The learned state Attorney submitted that so far the record is silent, it is to be taken to have pleaded not guilty. I out rightly differ with that proposition, on the following reasons.

Firstly on 6/6/2016 when the matter was mentioned for the first time, it was placed before B.C Okiri RM who was a justice of peace (probably is a Resident Magistrate at Primary Court), that is why a plea for the appellant was not taken or recorded. This is for simple reason that justices of peace have no jurisdiction or mandate to take plea for accused. Their powers are limited to adjourning matters, remanding in custody, granting bail and alike, as reflected in the record of the trial court (see sections 56 and 57 Cap 11 R.E 2002). Secondly on 8/9/2016 a charge was read over and explained to the accused (appellant herein) where he pleaded not guilty and his plea was recorded accordingly. As such this complains has no basis at all.

The third ground is that the trial magistrate did not direct his mind to the section of law which the appellant was charged which was not properly supported by the evidence on record. The learned State Attorney submitted that at page 18 of trial court proceedings/judgment, the trial court ruled that the prosecution had proved charge beyond reasonable doubt and convicted him accordingly, meaning that he was convicted as charged. I think the learned state Attorney missed a point or opted to eschew by design. The particulars of offence on a charge sheet reveal that the appellant was alleged to have carnal knowledge against the order of nature on Shaffii s/o Mkonja, and the evidence adduced by Prosecution was led to prove that fact. But the statement of offence shows that the appellant was charged for unnatural offence contrary to section 154(1) (a) and (b) of Cap 16 R.E 2002. Paragraph (a) of subsection (1) to section 154 Cap 16 (supra) is all about person who has carnal knowledge of any person

against the order of nature. Paragraph (b) of subsection (1) to section 154 Cap 16(supra) cater for any person who has carnal knowledge of an animal. It seems the appellant query this paragraph (b) which was inserted into a charge sheet, to his opinion rendered a charge to be not properly supported by evidence. Admittedly paragraph (b) was in applicable to the circumstances of this case and therefore was wrongly cited into a charge sheet. I understand that wrong citation is fatal.

But to the circumstances of this case where the applicable paragraph (a) is there, statement of offence is properly framed, to wit unnatural offence and particulars of the offence gives and described all necessary information which enabled the accused to understand that he stand charged for committing carnal knowledge against the order of nature to one Shaffii s/o Mkonja. It follows that the omission or error in the complaint is not fatal and is curable under section 388 Cap 20 R.E 2002.

The fourth ground goes thus the law was not adhered to when taking the evidence of PW1 and PW2 who were children of tender age at the time when they were unprocedural allowed to testify in court. Answering this ground the learned State Attorney submitted that PW1 was addressed under of section 127 TEA as amended by Act No 4/2016, where the proceeding reveal that PW1was capable of telling the truth (at page 11 of the proceedings) that PW2 aged 6 years, the court did not follow the procedure under section 127 (2) TEA. However he submitted that non conduct of voire dire has brought a lot of debate, whether voire dire should be conducted or not. He cited a case of **Kimbute Otinei Vs Republic**, Criminal Appeal No 24/2010 CAT at Arusha at page 87, the Court asked the

Parliament to amend section 127(2) TEA, where the Parliament amended it via Act No. 4/2016, where section 26 deleted section 127 (2) of TEA and replaced with a wording that a child of tender age may give evidence without taking or making oath or affirmation, but may before giving evidence promise to tell the truth and not to tell lies. He submitted that PW1's testimony was complied with the law, but PW2 if the court finds that the evidence was not received in compliance of the law may expunge his evidence as there is evidence of other witness to corroborate PW1. I cannot ascribe to suggestions posed by the learned State Attorney on the aspect of PW2. The lower court records reveal that before PW1 and PW2 were allowed to adduce evidence, were both addressed interms of section 127(2) of the Written Laws (Miscellaneous Amendments) Act No. 4/2016, where the trial court recorded that both had promised to tell the truth (see lower court proceedings at pages 9 and 11 for PW1 and PW2, respectively). To my findings, what the trial Magistrate did, was in conformity and compliance with the requirement of the law. Section 26 of the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016, provide and I quote,

*"Section 127 of the principal Act is amended by-*

*(a) deleting subsections (2) and (3) and substituting for them the following:*

*"(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies".*

In the circumstances, I hold that the trial court had abided to the requirement of the law, and therefore he cannot be faulted. May be I should add that a question posed by the learned trial magistrate to PW1, where the trial court asked whether he know the meaning of telling the truth or lies, to my opinion was superfluous, as that was not the law had intended to start asking questions to a child of tender age. What is important is for a child to explain fact in issue and to give rational answers. What the trial court did was tantamount taking back to the old age of démodé and out fashioned style of voire dire test, where such questions were used to be asked and posed to a child of tender age before permitting him or her to give evidence. It suffice to say that at the moment, the era of conducting voire dire test has gone, as were abolished and extinguished by Act No. 4/2016(supra). In a case of **Philipo Emmanuel Vs Republic**, Criminal Appeal No 499/2015 CAT at Mbeya (unreported), at pages 14-15 the Court held, I quote;

> *"with this provision, the requirement of a voire dire test has been effectively foregone but, as we have hinted upon, our remark is no more than "a by the way; much as Act No 4 of 2016 was not in force at the time of the proceedings at hand"*

It follows that voire dire test or any sort of alike, is no longer a requirement to be followed when or before receiving evidence of a witness of tender age. In the premises, the evidence of PW1 and PW2 was properly received in accordance with the procedure, as demonstrated herein above.

The final ground is that the trial Magistrate erred in law and fact by relying on the medical report (PF3, Exh P1) by a medical doctor who did

not lay down what qualification he had to give such opinion. Responding to this ground, the learned State Attorney submitted that the medical officer (doctor) testified in absence of appellant, as such one could wonder as to who demanded for qualification. Actually this ground is baseless, as at introduction part PW4 (medical doctor had introduced as Senior Assistant Medical Doctor). As such a complain that his qualification was not laid down (unknown) cannot be entertained. More important, a PF3 (Exh P1) which is also subject to critic by the appellant, therein, also PW4, who is the author of a content pertaining to medical examination, had indicated his qualification being Senior Assistant Medical Doctor(SAMD) with registration No 2415 and he appended his signature. Section 240 (1) and (2) of Cap 20 R.E 2002, provide, I quote,

> *"(1) In any trial before a subordinate court, any document purporting to be a report signed by a medical witness upon any purely medical or surgical matter shall be receivable in evidence.*
>
> *(2) The court may presume that the signature to any such document is genuine and that the person signing the same held the office or had the qualifications which he possessed to hold or to have when he signed it"*

In view of that, the fifth ground also succumbs. Generally, frankly speaking the prosecution evidence was watertight. The appellant was caught by PW2 and PW3 red-handed in flagrante delicto, committing sodomy to PW1. Indeed a PF 3 (Exh P1) reveal that PWS1 sustained multiple bruises with loss anal splinter, the medical doctor went on to remarks that there was penetration to the anal with blunt object. With this evidence, it will be

hardly impossible to rule that the accused (appellant herein) had probable defence on the merit in view of accommodating him under section 226 (2) Cap 20 R.E 2002.

Having adumbrated as herein above, I find the appeal devoid of merit. The trial court conviction and sentence are upheld.

Appeal dismissed.

**Sgd: Hon. E.B. Luvanda**
**JUDGE**
**14/6/2018**