IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO 319 OF 2017

ISSAYA JOB.....APPELANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

21 February & 23 April, 2018

DYANSOBERA, J.:

The appellant, Issaya Job, was convicted of unnatural offence c/s 154 (1) of the Penal Code, Cap 16 R.E 2002. After the trial of the case, the trial magistrate (Hamsini, Rm) was satisfied that the prosecution evidence weighed more than the defence of the appellant, he thus convicted and sentenced him to thirty years imprisonment in criminal case no 350 of 2016.

It was alleged by the prosecution that on the 24th December 2016 at about 2000hrs at Kivungo village in Kilosa District, the appellant did unlawfully have canal knowledge of a little boy, one Nehemia Godfrey,then aged four years against the order of nature. The appellant pleaded not quilty to the charge.

In his petition of appeal, the appellant is armed with nine grounds of appeal which both revolve around on a single point that the prosecution did not prove the case beyond reasonable doubt.

At the hearing of this appeal, the appellant appeared in person when the appeal came for hearing while the respondent/republic had the privilege of being presented by Ms Joas learned state attorney.

In support of the appeal, Ms Joas, learned State Attorney submitted that the charge sheet which the prosecution relied upon the conviction of the appellant is defective. She pointed out that the appellant was charged with unnatural offence but no sub section was stated.

She also added that under Section 132 of the **Criminal Procedure Act** the need for citing of specific a section is a mandatory requirement. In her view, failure of the prosecution side to cite a specific section related to the offence committed on

a charge sheet renders it defective and it is not curable under **Section 388(1) of Criminal Procedure Act**. Lastly the learned state attorney prayed this Court to quash the conviction and set aside the sentence. In emphasizing her point she brought into the attention of the Court the case of **Balthazar Gustavo &Amor Criminal Appeal No 266 of 2014**(Unreported).

In consideration of the submission made by the learned state attorney for the republic/respondent the main issue pending for determination before this Court is whether the prosecution proved the case beyond reasonable doubt.

It is the cardinal principal of law in criminal cases the prosecution is required to prove the case against the accused person beyond reasonable doubt see the Court of Appeal decision in **Horombo Elikaria V Republic Criminal Appeal No 50/2005(unreported).**

With greatest respect to the learned state attorney the Court is very far from being convinced that the charge sheet upon which the appellant was convicted is defective. In support of the appeal she stated that since the appellant was charged with unnatural offence, it was mandatory for the prosecution to cite subsection.

The record reflects the appellant was charged with unnatural offence c/s 154(1) (a) (c) (2) of the Penal Code [Cap 16 R.E 2002} which are relevant provisions in respect of the committed offence.On her submission the learned state attorney did not tell the Court which specific subsection was omitted in the charge sheet. The Court finds the charge sheet valid with no defect.

On the other hand, the Court has noted various discrepancies in the prosecution evidence with suggest the prosecution did not prove the case beyond reasonable doubt.

Starting with the evidence of PF3, it was admitted in Court without following the procedure of admission of exhibits. The law confers a right on an accused person to comment on the admission of any exhibit before its reception in evidence.

In addition, for admission of any medical report like PF3, the trial Court has an obligation under section 24(3) of the Criminal Procedure Act (Cap 20 R.E 2002) to inform the accused that he has the right to have the author of the medical report be called for cross-examination.

This is an area rich of Court authorities on this matter. It is a mandatory provision which trial Courts has to comply with. Since there was no such compliance against the appellant, the same PF 3 was wrongly entered into evidence. I, therefore, expunge it from the record.

The cases of **Mahons Sele V Republic Criminal Appeal No 188 of 2008,Hassan Amri VRepublic Criminal Appeal No 304 of 2010 and Tatizo Juma VRepublic Criminal Appeal No 10.2013**(all unreported) are some of the authorities on this matter.

Besides, I am of the view that the appellant's defence was not considered. The appellant on his defence stated that he had grudge with the mother of the victim but that was neither contradicted nor considered before the trial Court.

That resulted in miscarriage of justice on the appellant as it was observed in the case of **Jeremiah John and 40 others V Republic Criminal Appeal No 416/2014(unreported**).

The Court has also noted that the charge sheet upon which the appellant was convicted reflect the offence of unnatural offence however the evidence that was given by the prosecution witness specifically PW1 was that of rape, hence a disparity in the charge sheet and evidence that was used to support the prosecution.

Lastly it is the Court observation that, under normal circumstances it is quite unusual for a child of three years to utter uncommon words like "**Kutomba"** and "**Mkundu".**The Court is of the view that children of tender age have own ways of expressing their views one would not expect them to be specific as the prosecution evidence suggests.