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

CRIMINAL APPEAL NO 202 OF 2018
(Arising from Criminal Case No. 115 of 2014 Ilala District Court at Samora)

LAZARO DAMIAN.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

MASABO J,

This is an appeal emanating from the Criminal Case No. 115 of 2018 in the District Court of Ilala where the appellant was charged and convicted of an unnatural offence contrary to section 154 of The Penal Code [Cap.16 R.E 2002] and sentenced to thirty years imprisonment. It was alleged during trial that on different unknown dates in March 2014 at Chanika area within Ilala District the Appellant committed an unnatural offence against a boy of 7 years. Disgruntled the appellant appeal against both the conviction and sentence. His appeal was based on 7 grounds but he later filed three additional grounds making a total of 10 grounds of appeal as here below:

1. That, the learned trial Magistrate erred in both law and fact by convicting the appellant based on a defective charge whereas the provision of the Penal Code preferred against him had two conflicting subsections which rendered the appellant not to understand the category of the charge is facing.

2. That, the learned trial magistrate erred in both law and fact by convicting the appellant based on a case where the prosecution failed to lead investigatory evidence from the arresting re-arresting officer to prove /suggest that his arrest emanated from the case at hand.

3. That, the learned trial magistrate erred in both law and fact by convicting the appellant despite that the prosecution failed to summon the victim's grandmother who is alleged to have witnessed the said crime.

4. That, the learned trial magistrate erred in convicting the appellant without drawing an adverse inference against the prosecution case as to how a parent could have stayed at home for three weeks with a child who could not control his feaces.

5. That, the learned trial magistrate erred in convicting the appellant based on fictitious, incredible, inconsistent uncorroborated evidence of prosecution witnesses.

6. That, the learned trial magistrate erred in both law and fact by convicting the appellant without considering his age (he was a minor).

7. That, the learned trial magistrate erred in both law and fact by convicting the appellant based on a case that was poorly investigated and prosecuted, hence the charge was not prove to the required standard.

8. That the learned trial magistrate grossly erred in holding to PW1's evidence procured un- procedural where the witness was sworn first before being subjected to *Voire Dire* test in compliance with mandatory provision of evidence Act [Cap 16 R.E 2002].

9. That the learned trial magistrate erred in ignoring the appellant defence case without assigning any convicting reasons

10. That, the learned trial magistrate erred by holding that the prosecution proved their case against the appellant beyond reasonable doubt.

During the hearing of the appellant appeared in person. The Respondent Republic was represented by Ms. Christine Joas, Learned State Attorney.

The Appellant did not say much in his submission in chief. He just expressed his confidence in the court that it will do justice by finding merit in his appeal and thereby allowing his appeal and relerasiong him from jail.

For the Respondent Republic Ms. Joas submitted that the conviction and sentence are well grounded. On the first ground she submitted that the charge was not defective as the offence against which the appellant was charged is an unnatural offence provided for under section 154(1)(a) of the Penal Code and because the victim was under the age of 10 years, subsection 2 of the same section was applicable. She further submitted that the second ground is devoid of merit as the appellant knew why he was brought to court. On the third ground, she submitted that the complaint that the grandmother was not brought to court to testify as a witness is with no merit. In support she cited the case of **Tumaini Tayomba V R** Criminal Appeal No 217 of 2002 in which it was held that the child is the best witness. That in the instance case the evidence of the victim was sufficient to establish the guilty of the appellant. On the fourth ground Ms. Joas submitted that PW1 and PW2 there is no reason to draw an adverse inference because it is on record that the parent of the victim had travelled and upon return they were informed of the offence by the

victim. Ms. Joas argued further that the testimony of PW1 was watertight and was supported by the evidence of PW3 who medically examined him and there was no need for further corroboration. Ms. Joas further submitted that the complaint that the appellant was a minor is baseless as he testified that he was 18 years of age. Pertaining the additional grounds, Ms. Joas submitted that it is true that *voire dire* was conducted after PW1's testimony but the court was satisfied that the Victim was intelligent and she understood the meaning of truth. On the ground that the appellant's defence was ignored, she argued that it was baseless as the court held that his testimony did not raise a reasonable doubt. Lastly she argued that, the case was proved beyond reasonable doubt, the victim knew the appellant well as he used to sleep with him in one room, PF3 was tendered and admitted.

In rejoinder the appellant refuted that he used to sleep with the victim in one room as the victim used to was sleep with his parent and he, the appellant, was not living with the victim's family. He further argued that the PW1 did not tell the court when the appellant committed the offence. He further alleged that the complaint was made up by PW1 mother with whom they have a misunderstanding.

I have considered the appellant's submission in support of his appeal and rival submission by the learned State Attorney. Regarding the first ground of appeal that that the charge is defective containing two conflicting sub section, the law requires the Prosecutor to ensure that the charge prepared

against the accused contains all the ingredients of the offence and the respective provisions of the law under which the accussed is charged. In the instant case the Appellant was charged of unnatural offence in the following count:

CHARGE

STATEMENT OF THE OFFENCE

UNNATURAL OFFENCE: **Contrary to Section 154(1) (a) and (2) of the Penal Code [Cap.16 R.E 2002].**

PARTICULARS OF THE OFFENCE

LAZARO DAMIAN, on unknown date in March,2014 at Chanika area with Ilala District in Dar es salaam Region did have canal knowledge of one LUCAS contrary to section 154(1) (a) and (2) of the Penal Code Cap 16. [Emphasis added]

Section 154(1) (a) and (2) of the Penal Code Cap 16 provides as follows:

(1) Any person who

(a) has carnal knowledge of any person against the order of nature;

(b) .....

(c).....

commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) where the offence, under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment

The issue therefore is whether or not the two subsections contradict. The answer to this is strictly in the negative. As it could be seen from the provision above, subsection 1(a) establishes the offence whereas sub section 2 provides for punishment where the victim is of the age bellow 10 years. In the instant case, the victim's age was seven years hence it was within the purview of subsection 2. Thus under the circumstances, it is vivid that the charge sheet was framed in a way that not only informed the appellant of the offence against which he was charged but it also adequately informed him of the seriousness of the offence charged and in so doing it accorded the appellant with all the material facts and opportunity to prepare his defence knowing that the offence against which he was charged was a serious one attracting a stiff sentence. The first ground of appeal is therefore without any merit.

Having made a finding on the first ground, I would ordinarily chronologically proceed to the 2nd ground. However, I have found it imperative to start with the 8th ground as it touches on very important matter. Scrutiny of the records and the judgment thereto would reveal that the conviction was heavily based on the testimony of PW1 and off course, the corroborating testimony of PW3 (medical expert), and the testimony of PW2 which were basically hearsay with lesser value compared to the

testimony of PW1. Thus, if the testimony of PW1 is found to be un-procedurally procured it will have an extensive effect on the conviction and the sentence thereto.

Before I dwell on this issue, let me state that I am alive to the amendment effected to the Evidence Act in 2016 which removed the requirement for voire dire test. The impugned trial was conducted in 2014 before the said amendment hence it had to comply to the old position of section 127 (2) which required the court to conduct *voire dire test* to determine whether the child of tender years about to testify understands the nature of oath and is therefore capable of giving evidence under oath or if not, whether he is possessed of sufficient intelligence and understands the duty of speaking the truth so as to justify the reception of his evidence. The victim in the instant case was 7 years at the material time hence the conduct of *voire dire* test prior to receipt of his testimony was a mandatory legal requirement.

The procedure for administering a voire dire test required that some rational questions be put on the child to test its level of intelligent and whether or not he understands the meaning of telling the truth. It is a rule of practice that the question put to the child and the answers thereto be recorded. As held by the court of appeal in **Afason Samwel Vs. Republic**- Criminal Appeal No. 105 of 2006- CAT at Arusha-

> "In determining whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth, the trial magistrate or judge must conduct a voire dire examination. He may put some questions to the child and from his answers he may be

> able to determine whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth. How a voire dire test is conducted appears to be a matter of style. But recording questions and answers appears to be a better way because this enables even an appellate court to know whether the questions asked and the answers given were such that any court of law would have come to the conclusion that the child was possessed of sufficient intelligence and understood the duty of speaking the truth.

The records (page 8 of the proceedings) show that the *Voire dire* was conducted before the trial court received PW1 evidence. However, as per the appellant's complaint, records indicate that PW1 was sworn prior to conducting the *voire dire* test being conducted. The question therefore is whether or not the swearing in complied with the legal requirement. The answer to this question can be deduced from the decision of the Court of Appeal in the case of **Mohamed Sainyeye v Republic** Criminal appeal no. 57 of 2010. In this case, the Court of Appeal held that:

> PROCEDURE TO FIND OUT WHETHER A CHILD OF TENDER AGE IS COMPETENT TO TESTIFY:
>
> **A. ON OATH**
>
> 1. The magistrate Judge questions the child to ascertain.
>
> (a) The age of the child.
>
> child to be sworn or affirmed and will note this on the case record:
>
> **B. UNSWORN**

1. If the court finds that the child does not understand the nature of an oath, it must before allowing the child to give evidence determine through questioning the child two things: -

(a) That the child is possessed of sufficient intelligence to justify the reception of the evidence, AND

(b) That the child understands the duty of speaking the truth.

Again the findings of each point must be recorded on the record.

C. IN CASE THE CHILD IS INCAPABLE TO MEET THE ABOVE TWO POINTS (A & B)

Court should indicate on the record and the child should not give evidence

In the instant case the *voire dire* test was conducted in the following fashion:

PW1: Lucas Damian, 7 years, student resides at Chanika, Christian sworn and states:

Court: It is voire dire evidence c/s 127 TEA

-What is your name? Lucas Damian I am standard two

-Which School are you studying?

- Tungini Primary School

- Are you Muslim or Christian
  - I am Christian Pentecostal

- Do you know and believe in God
    - Yes, I know and believe in God
- Do you know the meaning of telling the truth?
    - Yes I know

-What do you feel is a person tells untrue story?

- I feel bad

COURT: I realise that he understands the meaning of the truth.

-He is competent to testy before the court

From the procedure laid down in the authorities above cited, it is vivid, as stated by the appellant that the *viore die* test was un-procedurally done. PW1 ought to have been sworn after being questioned and upon the court making a finding on whether he understands the nature of an oath. The trail magistrate, not only erred by starting with an oath, but also, he erred by not complying with the requirement to make a finding on whether or not PW1 understood the meaning of the oath and whether he is possessed of sufficient intelligence to justify the taking of his testimony without oath.

Failure to comply with the requirement under section 127 renders the testimony of PW1 as unsworn evidence which under the law requires corroboration (see **Deemay Daati & 2 Others v R**, Criminal Appeal 80 of 2004, Court of Appeal of Tanzania at Arusha (2004) (unreported); **Nguza Vicking & 3 Others v R,** Criminal Appeal 56 of 2005, Court of Appeal of Tanzania at Dar es Salaam (2010) (unreported); Thus, pour next question is whether or not the testimony of PW1 was corroborated. In, my settled opinion, the testimony of PW1 regarding the fact that he was known

against the order of nature was sufficiently corroborated by the testimony of PW3, a doctor who medically examined PW1 and found that he was carnally known against the order of nature and that his anus was loose. However, on the other hand, the testimony on who actually committed the heinous act against PW1 was not sufficiently corroborated as all we have is the testimony of PW2, PW3 and PW4 whose testimony in respect of this issue is a mere hearsay. None of them was at the scene, all they told the court was a story narrated to them by PW1.

On account of the above, I am of the considered view that since the "voire dire examination" was unprocedurally conducted, let the matter be remitted to the trial court for an expeditiously retried before a magistrate with competent jurisdiction. Meanwhile, the appellant will remain under custody.

Dated at Dar es Salaam this 4th day of December 2019.

J.L. MASABO
JUDGE