IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 18 OF 2020

(Original Criminal Case No. 397 of 2018 before District Court of Moshi at Moshi)

LAURENT PATRICK KILALA @ KABILA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

5th October & 30th November, 2020

MWENEMPAZI, J:

This appeal is against the decison of the District Court of Moshi in Criminal Case No. 397/2018 before Mawole J, RM. The appellant was charged with one count of unnatural offence contrary to **section 154 (1) (a) (2) of the Penal Code**, Cap. 16, R.E. 2002 (the Penal Code) as amended by **section 185 of the Law of the Child Act** No. 21 of 2009. The prosecution alleged that on 12th July, 2018 at Kibosho-Mweka within Moshi District in Kilimanjaro Region, the appellant had carnal knowledge of one SG (true identity hidden), a boy of 10 years old, against the order of nature.

At the trial court the respondent paraded a total of four (4) witnesses and one exhibit whereas the appellant fended himself. At the end of trial the court was satisfied the the presecution proved their case at the required standard; the court convicted and sentenced the appelant for life

He argued that the Magistrate erred to base on such testimony while the victim in the typed proceedings at page 11-12 admitted neither to know the duty to speak the truth nor the meaning or essence of oath. His testimony was not supposed to be relied fully by the prosecution and the court to proceed convicting the appellant. Learned advocate argued that, it is a legal requirement in criminal cases especially after the amendment by Act No. 4 of 2016 which amended section 127(2) of the Evidence Act, Cap 6 R.E 2002 (Evidence Act). In the said amendment, the law has introduced a new criteria that the child should promise to tell the truth.

That, from the wording of the amended section a child of tender age may testify in court but shall promise to tell the truth, but in the record there is nowhere the child promised to tell the truth which is contrary to the law. To cement his contention, he cited the case of **Godfrey Wilson V The Republic, Criminal Appeal No. 168 of 2018, CAT (Bukoba)** where Court of Appeal of Tanzanian listed two conditions at page 11 that;

1. *The amendment allows the child of a tender age to give evidence without oath or affirmation.*
2. *Before giving such evidence it is mandatory to promise to tell the truth to the court and not to tell lies.*

Such promise must be recorded before recording evidence, the proceedings shows that part was not complied. The appellant therefore was not properly convicted and ultimately sentenced.

On the 2nd ground, Mr. Ringo submitted that the trial magistrate erred in law and fact by convicting the appellant basing on the testimony of the doctor or PW4 while there was no proof whether it is the appellant who committed

however, the principle still applies in equal force regardless or not the accused defended himself or not. This case has many gaps which must be resolved in favor of the appellant. On the fourth and last ground of appeal Mr. Ringo contended that, the trial magistrate failed to properly analyze and evaluate evidence adduced in court and proceeded to convict the appellant as follows; **First**, the trial magistrate convicted the appellant after hearing contradicting evidence of 4 witnesses. PW1, grandmother of the victim denies that she did not know the appellant and then again he once went at the village which contradicts testimony of PW2 who also stated not to know Kabila before but later he said he knew him. How comes the two witnesses contradict each other while are village mates. Credibility of these witnesses is questionable. The court ought to have properly evaluated the evidence.

Secondly, the trial magistrate convicted the appellants relying on the incredible witnesses which makes the whole prosecution evidence suspicious. The issue of credibility of witnesses was the subject of discussion in the case of **DPP vs Simon Mashauri, Criminal Appeal No. 3194/2017** where Court of Appeal of Tanzania at page 10 held that;

> *"The credibility of a witness can be determined in two ways one, when assessing the coherence of the testimony of that witness. Two; when the testimony of that witness, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the finding of the appellate court."*

On 2nd ground, it was not the duty of PW4 to connect the appellant with the offence. The duty of PW4 was to record history of the patient and examine the patient since he was not at the scene of crime to conclude that it was the appellant that sodomized PW2. More so, the doctor at page 25 of typed proceedings, testified that on examination of the child his anus was red and there was no bruises but his sphincter muscles were loose since it was easy for the bruises to heal still the sphincter was lose. Thus, his evidence was sufficient.

On the 3rd ground of appeal, the Republic has opinion that the offence was proved beyond any reasonable doubt since prosecution proved the case basing on the ingredient of the offence not otherwise. That, according to the testimony of PW1 and PW3, PW4 and Exhibit P1, it is without doubt that carnal knowledge happened and the victim mentioned the appellant which in general indicates that the Republic fulfilled their duty without any reasonable doubt.

On the 4th ground, Ms. Pima submitted that, the trial magistrate adhered to directives in how to compose a judgment as found in S. 312(1) (a) of CPA, as she properly evaluated/analyzed evidence on record, the demeanor and credibility of witnesses and reached a fair decision. Regarding the age of the victim, Ms. Pima argued that the same is reflected in the charge sheet. Also Exhibit P1 has the age of the child as was mentioned by PW1 to the doctor.

Ms. Pima finally submitted that, the trial court satisfied itself to the overwhelming evidence until it convicted the appellant. That, the contradictions alleged are minor and do not touch the root of the offence. She prayed that the conviction and sentence be upheld.

not give promise to speak the truth and or it was not recorded as such by the Court. On the other side the respondent argued that PW2 promised to speak the truth in compliance with section 127(2) of the Evidence Act as amended. I took the liberty of perusing the trial court's records on that aspect and what I gathered was that, simple knowledge question were asked to PW2 and at the end the court observed that, I quote;

> *"Court; the simple questions asked to the witness who is a child of 10 years old, and how they respond shows that the child is intelligent enough to understand the questions he is asked, but he don't know the duty to speak the truth and the nature of an oath. His testimony will be taken not under oath"*

This shows that, after inquiring on PW1 knowledge, the trial magistrate made a finding that PW2 has sufficient intelligence to tell the truth but failed to record PW2's own statement that he promised to tell the truth and not lies. Failure of such promise indicates that his evidence was wrongly admitted and therefore cannot be considered as evidence at all.

In the case of **Godfrey Wilson vs The Republic,** Criminal Appeal No. 168, 2018 (unreported) Court of Appeal of Tanzania held that;

> *"In this case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied with before taking the evidence of the victim. In the absence of promise by PW1, we think that her evidence was not properly*

merited to the extent explained above. This case should be heard afresh by another magistrate.

It is so ordered.

T. M. Mwenempazi
Judge
30/11/2020