IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 110 OF 2020

(Original Criminal Case No. 88 of 2019 of the District Court of Dodoma at Dodoma)

BARAKA TUMAINI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

12/11/2020 & 3/12/2020

JUDGMENT

MASAJU, J

The Appellant, Baraka Tumaini, was charged with, tried and convicted of Unnatural Offence contrary to section 154 (1) (a) of the Penal Code, [Cap 16] in the District Court of Dodoma at Dodoma. He was sentenced to thirty (30) years imprisonment. Aggrieved with the decision, the Appellant came to the Court by way of an appeal.

The Appellants' Petition of Appeal is made up of eleven (11) grounds of appeal in which he essentially argues that the prosecution case against him was not proved beyond reasonable doubt in the trial Court.

When the appeal was heard in the Court on the 12th day of November, 2020 the layman Appellant appeared in person and prayed to adopt his Petition of appeal.

The Respondent Republic was represented by Ms. Phoibe Magili, the learned State Attorney who contested the appeal in its entirety. The learned State Attorney consolidated the eleven (11) grounds of appeal into three grounds of appeal. The Respondent submitted against the 2nd ground of appeal by arguing that the requirement o section 127 (2) of the Evidence Act, [Cap 6] does not bar the victim of crime, Melkzedeck Joseph (PW1) who was 14 years of age to give his evidence under oath. That, moreover the evidence by PW1 was corroborated by the evidence of Dr. Thobias Bundala (PW4).

On the other grounds of appeal (the 3rd, 4th, 5th, 6th and 7th) the Respondent submitted that the Appellant used to have carnal knowledge of the victim during school holidays. That, the Appellant used to expose the

victim on pornograph and thereafter the Appellant was having carnal knowledge of him (PW1).

The Respondent lastly submitted on the 1st and 8th grounds of appeal that the prosecution case against the Appellant was proved beyond reasonable doubt accordingly in compliance with the requirement provided for under section 154 (1) (a) of the Penal Code, [Cap 16] in respect of penetration as so rightly testified by PW4. That, the defence evidence was considered by the trial Court as per page 10 of the judgment. That, the Appellant also did not contest the cautioned statement on his confession of the crime when it was admitted in the trial Court. The Respondent prayed the Court to dismiss the appeal accordingly for want of merit. That, is what was shared by the parties in the Court.

The victim of crime, PW1 was said to be 14 years of age, this is according to the victim himself together with the testimony by his mother, Georgina Godson Kalage (PW2). Section 127 (2) of the Evidence Act, [Cap 6] requires the child of tender age before giving evidence, to promise to tell the truth to the Court and not to tell any lies. Section 127 (4) of the Evidence Act, [Cap 6] defines "a child of tender age" to be a child whose apparent age is not more than fourteen years. In the instant case, the age

of PW1 was 14 years old, hence a child of tender age whose testimony in the trial Court was to be in accordance with section 127 (2) of the Evidence act, [Cap 6] but it was not. That being the case, his purported evidence in the trial Court is hereby expunged from the record of evidence.

Medical examination was conducted on the victim of crime by PW4 who testified in the trial Court and tendered the Medical Examination Report (Exhibit PE 1). The Medical Examination Report only states that there was no any bruises, no any discharge of sperms seen as the act was alleged to have been committed four (4) days prior. The Medical Examination Report did not state whether PW1's sphincter muscles were loose or tight so as to prove unnatural offence. In his testimony, PW4 contradicted the Medical Examination Report by alleging that he found PW1's anus not intact and that he ought to have been penetrated by a blunt object. PW4's story does not match his observations in the PF3. In sexual offences penetration must be proved for the crime to be said to have been committed. In this case penetration was not proved. Also, PW4's cannot be taken seriously by the Court for his contradictory evidence.

The Police Officer who investigated the crime G. 1848 D/C Michael (PW5) testified in the trial Court to have investigated the crime and to have written the Appellant's Cautioned Statement which was admitted in the trial Court as exhibit "PE 2." That, he recorded the Cautioned Statement on the 26th day of May, 2019 at 1202hrs. According to the prosecution witnesses evidence, the Appellant was taken to the police station on the 24th day of May, 2019 prior to PW1 being taken to the hospital for Medical checkup. This means the Appellant's alleged Cautioned Statement was taken two (2) days after his being handled over to the police station. Section 50 (1) of the Criminal Procedure Act, [Cap 20] provides for the required time for a person under restraint to be intervened, that is, four (4) hours commencing at the time when he was taken under restraint. In the instant case, the Appellant was interviewed more than four hours later with no reasons for the delay thereof nor was there any extension of time sought pursuant to section 51 (1) of the Criminal Procedure Act, [Cap 20]. That said, the unlawfully obtained cautioned statement (Exhibit PE2) is hereby expunged from the record of evidence.

The Court is of the considered position that since the victim of crime (PW1) was not a credible evidence, his testimony in the trial Court was

therefore short of grounding safe conviction of the Appellant pursuant to section 127 (6) of the evidence Act, [Cap 6] and secton115 (3) of the Law of the Child Act, [Cap 13], for the said Melkzedeck Joseph (PW1) was neither a credible nor witness of truth.

The remaining prosecution evidence is fraught with gaps as to whether it is the Appellant who allegedly had carnally known PW1 against the order of nature since there were allegations that PW1 was caught in the school dormitory in attempt of performing sexual acts against the order of nature with another person. There is no any other evidence connecting the Appellant to the crime.

That said, the prosecution case against the Appellant in the trial Court was not proved beyond reasonable doubt. The appeal is accordingly allowed. The conviction and the sentence thereof respectively are hereby quashed and set aside accordingly. The Appellant shall be leased from the prison forthwith unless lawfully held for another cause.

GEORGE M. MASAJU

JUDGE

3/12/2020