IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 130 OF 2019

(Appeal arising from the judgement of the District Court of Shinyanga, in criminal case No.02/2018)

MSIGALA S/O SALUM.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

02/3 & 27/03/2020

G. J. Mdemu, J:

In the District Court of Shinyanga, the Appellant was charged with unnatural offence contrary to the provisions of section 154 (1)(a) of the Penal Code, Cap. 16. It was alleged in the particulars of offence that, on 20th December 2017 at Majengo Mapya area within Shinyanga Municipality, in Shinyanga Region, the Appellant did have carnal knowledge of one YAHYA S/O JUMA a child aged three (3) years against the order of nature.

Brief facts of the case are that; on the fateful day, the victim PW3 was playing outside their homestead. PW1, mother of the victim, heard a voice calling her. She responded immediately and found some people and the Appellant who was under arrest. One NOAH, informed PW1 that, the Appellant sodomised PW3. She (PW1) then took the victim and observed him in his anus in which, she detected some bruises. She then informed her husband (PW2) who reported the matter to police station.

According to PW4 one Doctor Dismas Stephine and the PF3 (P1), PW3 had fresh bruisers. PW3 also stated to have been sodomised by the Appellant. With this evidence, the trial Court convicted the Appellant and sentenced him to life imprisonment. This was on 19/2/2019. Being aggrieved, the Appellant appealed to this court on four grounds of appeal as follows;

1. *That the trial magistrate erred in law and fact by not taking into consideration that, the investigator of the crime (PW5) did not appear in person before the court of law to testify the same as was the key witness.*
2. *That the trial magistrate erred in law and fact by misapprehension holding liable the Appellant without being convicted the offence charged, rather, was found guilty against the law require jury to abide with.*
3. *That the trial magistrate erred in law and fact to alter the sentence which is excessive to the Appellant as is against the law required.*
4. *That the trial magistrate erred in law and fact by considering the expert evidence which emanated from the direction and demands of PW2, mother of the victim then purported to examine the victim and to fill the purported PF3 which is against medical ethics.*

At the hearing of the appeal on 2nd of March 2020, the Appellant appeared in person whereas the Respondent Republic had the service of Ms. Mushi, learned State Attorney. In support of his appeal, the Appellant opted to rely on his grounds of appeal which she prayed to be adopted. He also added that, a person who witnessed the incident was not called to testify despite his repeated reminder to court. He thus urged me, on those premises to have his appeal allowed.

The learned State Attorney did not support the appeal. She submitted on the first ground of appeal regarding the issue of key witness that, a key witness in the case at hand was not the investigator, but victim (PW3). She cited the case of ***Seleman Makumba v. Republic (2006) TLR 375,*** and observed that, PW3 was the victim who testified on how the Appellant sodomised him. She therefore observed that, this ground of appeal is unfounded.

In the second ground of appeal on want of conviction, she submitted that, at page 6 paragraph 1 of the judgment, the Appellant was convicted. What is on record is therefore a typing error. She also found this ground of appeal unfounded.

As to the third ground of appeal that sentence was excessive, the learned State Attorney submitted that, the sentence was not excessive, because it is clear that, life custodial sentence in terms of section 154(2), of the Penal Code is provided where the victim of sexual offence is less than 10 years of age. She further submitted that, the charge omitted subsection (2) of section 154, but the omission is not fatal because the accused understood the charge read to him and that, the age of the victim was three years. The Appellant therefore had full knowledge on the circumstances of the case and seriousness of the

offence. She thus cited the case of ***Ally Ramadhani Shekindo & Sadick Said @ Athumani v. The Republic, Criminal Appeal No. 532 of 2017*** *(unreported)* to support her argument.

In the fourth ground of appeal, the Learned State Attorney submitted that, PW5 testified on how he attended the victim and issued a PF3 in which according to the evidence of PW4 who made diagnosis and filled the PF3, (exhibit P1). The victim was found with bruisers. Therefore, she stated that, one NOHA was not called in court, but at page 26 of the proceedings, his statement was tendered. He concluded therefore that, the evidence of victim is watertight even when that statement is expunged in evidence. On his part, the Appellant had nothing useful in rejoinder. This was all from the parties.

I have gone through submissions of both parties, that is, the Appellant and the Respondent Republic, grounds of appeal and also upon perusal of the records of the District Court of Shinyanga, the issue for determination by this court is whether the prosecution proved its case beyond reasonable doubt. This issue sums up what is contained in all four grounds of appeal.

I wish to begin with the second ground of appeal that, the trial court did not enter conviction as mandated by the law before he proceeded to sentence the Appellant. The legal position is in **section 235(1) of the Criminal Procedure Act**, Cap. 20 which, provides that;

> *"235(1) -The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him*

according to law or shall acquit or discharge him under section 38 of the Penal Code"

This Section as quoted above, is couched in mandatory terms. In the instant appeal, page 6 of the typed judgment reads as follows;

"Therefore, I found the accused guilty of an offence charged and hereby ***commit*** *an accused person under section 154(1) of the Penal Code, Cap. 16 (R.E 2002) order accordingly"*

However, in the original handwritten judgement of trial court, this part of judgment reads that;

"Therefore, I found the accused guilty of an offence charged and hereby ***convict*** *an accused person under section 154(1) of the Penal Code Cap. (R.E 2002). Order accordingly" (emphasis mine)*

On the light of the above, it is clear that, there was a typing error as observed by the learned State Attorney. The Appellant was therefore convicted and thus, this ground of appeal is not meritorious.

As to the first ground of appeal that the prosecution at trial did not call PW5, an investigator, as the key witness; this ground is misconceived. Upon perusing the record at page 20 and 21 of the typed proceedings it is openly seen that, the investigator of the case appeared in court and testified as PW5,

one MOE 6968 D/Cpl Joseph. The records further reveal that, the Appellant cross examined PW5 at page 21 of the typed proceedings. Therefore, much as the investigator in this case is not a key witness , but the evidence indicates that, the investigator testified. I do not, as the learned State Attorney did, find any merit to this ground of appeal.

I should comment on one thing. In this instant appeal, the important witness was one Noah who did not appear to testify, and instead the record shows that his statement was used at the trial. The Appellant did not raise this in his grounds of appeal. Notwithstanding, he was a key witness of prosecution side. However, as stated, a statement of NOAH was tendered as exhibit in the trial court. However, the proceedings are silent on the efforts deployed by the prosecution to locate that witness.

PW6 one 6968 D/Cpl Joseph who tendered the statement of one Naoh Nola did not lay down foundation as to where about the said Noah Nola such that his statement be used instead. At page 25 of the typed proceedings, PW6 made the following before tendering the statement:-

> *"when I see statement, I can identify it, it is my signature, the time to start and the time to finishing. The witness (PW4) certified the exhibit."*

There are two anomalies in the above version. **One** that there is no statement on the effort deployed to trace the said Noah and **Two** that, the learned State Attorney, not the witness, is the one who tendered the statement as observed at page 26 of the typed proceedings in the following version:-

*"**State Attorney Ms. Tuka**. I pray to tender the statement of Noah Nolla as an exhibit.*

*"**Court**-the statement of Noah Nolla admitted and marked as an exhibit."*

It was not proper and legally not acceptable for the prosecuting Attorney to tender the said statement. Apart from failure of the said witness to establish impossibility of procuring the said Noah in evidence as required by section 34B of the Evidence Act, Cap. 6; the same section also require a notice to produce that statement be filed together with a copy of the statement within 10 days. This has not also being done. As the tendering of the statement violated the provisions of section 34 B of the evidence Act, the said statement is expunged in evidence.

With regard to the fourth ground of appeal. It is an undisputable fact that, at time of giving his evidence, PW3 was a child of tender age though his age was not specifically proved to be three (3) years. The procedure for taking evidence of a child of tender age is provided for under the provisions of Section **127(2) of the Evidence Act, Cap. 6** as amended by Act No. 4 of 2016 that;

"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 lies"

In the case at hand, PW3 gave his evidence without promise to tell the truth and not to tell lies. At page 12 of the trial court proceedings, the record on this reads:

*"**Accused**- present*

***Public Prosecutor**-Case for hearing, I have a witness who is 3 years of age*

***Court**-The witness is below 6 years but he is very intelligent wants to testify without oath."*

From the above quoted, part of proceedings, much as there is no clear procedure on how the trial court may arrive at a position that the witness of tender age should promise to tell the truth and not lie before receiving his or her evidence, it is not known how did the trial magistrate in the instant appeal came to a finding that the "*child is very intelligent wants to testify without oath*"

In the case of **Issa Salum Nambaluka v. R, Criminal Appeal No. 272 of 2018,** the Court of Appeal at page 10 -11 of the judgment made the following observation regarding this legal requirement:

"From the plain meaning of the provisions of sub-section (2) of s. 127 of the Evidence Act which has been reproduced above, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. ***In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies****. Section 127 of the Evidence Act is however silent on*

the method of determining whether such child may be required to give evidence on oath or affirmation or not.

It is for this reason that in the case of ***Geoffrey Wilson v. Republic, criminal Appeal No. 168 of 2018*** *(unreported), we stated that, where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath of affirmation depending on the religion professed by such child witness.* ***If such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies."***

In the instant appeal, PW3 was a child of tender age who testified without promising to tell the truth and not lies in violation of the provision of section 127 (2) of the Evidence Act. The resultant effect of such non-compliance was stated in **Issa Salum Nambaluka** (supra) at page 12 of the judgment as hereunder:

"In the case at hand, PW1 gave her evidence on affirmation. The record does not reflect that she understood the nature of oath. As stated above, under the current position of the law, if the child witness does not understand the nature of oath, she or he can still give evidence without taking oath or making an

affirmation but must promise to tell the truth and not to tell lies. In the circumstances therefore, we agree with both the appellant and the learned Senior State Attorney that in this case, the procedure used to take PW1'S evidence contravened the provisions of s. 127 (2) of the Evidence Act. For these reasons, we allow the 2nd ground of appeal. ***As a result, the evidence of PW1 which was received contrary to the provisions of s. 127 (2) of the Evidence Act is hereby expunged from the record."***

In view thereof and in the light of what is stated above, the evidence PW3 is hereby expunged from the record. That being the case it is settled l that, the true and best evidence in sexual offences is that of a victim as decid in the case of **Selemani Makumba V. Republic (2006)TLR 379.**

Since one Noah was not called as a witness and his statement tendered terms of section 34B of the Evidence Act got expunged for procedu irregularities, this therefore renders the evidence of PW1 mother of a victim to Lack corroboration and therefore a hearsay one.

Before I conclude, there is a question of variance of dates between the evidence tendered by the prosecution, PF3 inclusive and the charge. PW1 testified that, the incident was reported to the police where the victim was issued with PF3. After perusal of the records of the trial court, I found that PW1 and PW2, stated that the offence was committed on 20/12/2017. This is what formed the basis of the charge. But the PF3 tendered as exhibit P1 was

filled on 19/12/2017. This means that PF3 was filled before the offence got committed. This therefore, creates doubts in the prosecution case.

Clarifying this position, it was stated in the case of ***Peter Ndiema and Nikas Ndiema v Republic, Criminal Appeal No.469/2015,*** which referred the case *of* ***Leonard Raphael and Another v. Republic,*** Criminal Appeal No.4/1992 (unreported) that;

> *"Variance of dates between the charge and evidence tendered by the prosecution witnesses rendered the acquittal of the Appellants."*

Having said all, I am of the view that, the evidence of the prosecution created a lot of doubts. In view thereof, I quash conviction and set aside sentence of the trial Court, and consequently order immediate release of the Appellant from prison unless, for lawful cause, he is held thereto.

It is so ordered

G. J. Mdemu
Judge
27/3/2020

DATED at **Shinyanga** this 27th day of March, 2020.

G. J. Mdemu
JUDGE
27/3/2020