IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 62 OF 2021

(Originating from Criminal Case No. 457 of 2020 in the District Court of Moshi at Moshi)

SILAS DICKSON MOSHI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellant was arraigned before the District Court of Moshi at Moshi (the trial court) in Criminal Case No. 457 of 2020 charged with unnatural offence contrary to **section 154 (1) (a) and (2)** of the **Penal Code,** Cap 16, R.E. 2002 (now R.E. 2019). It was alleged on unknown date and month of 2020 at Shia area, old Moshi within Moshi District in Kilimanjaro Region, the appellant had carnal knowledge of one "**RK**", (true identity hidden) a boy of 7 years against the order of nature.

At the trial court, the prosecution called five (5) witnesses, PW1-the victim's mother, PW2-the victim's grandmother, PW3-the victim, PW4-investigator and lastly PW5-Medical Doctor who examined the victim and prepared the PF3 report which was admitted in evidence as exhibit P1. Likewise, the defence side had two witnesses, DW1-the appellant and DW2-his wife.

According to respondent's staged case, the unfortunate ordeal happened on 30th October, 2020 when PW3 while passing by the appellant's room, was invited by the appellant therein. The appellant who was by then a tenant in the victim's grandmother's house, dragged him inside, ordered him to lay on his stomach, undressed him and he too stripped naked and inserted his *'kidudu'* into the victim's anus. When he was done, he warned him not to disclose to anyone what had transpired but the victim disclosed the incident to (PW2), his grandmother on the same day. This was after she found faeces in his underpants. He was then taken to hospital and the medical examination revealed, the victim was penetrated through by a blunt object against the order of nature. PW2 informed PW1, (the victim's mother) who

reported the incident to the authorities and ultimately leading to the appellant's apprehension.

In his defence, the appellant claimed there was no proof that, he had carnally known the victim against the order of nature. He also claimed, he had on going grudges with the victim's grandmother (PW2) who sexually seduced him but he refused to sleep with her. In that regard this case had been fabricated against him out of hatred. To put salt to the wound he had shifted from the grandmother's premises six months prior to the incident. After a full trial, the trial court was satisfied that, the respondent's side had proved its case to the required standard in criminal jurisprudence, convicted and sentenced the appellant to serve thirty years imprisonment. Aggrieved, the appellant has filed this appeal comprising of six grounds as follows: -

1. That, the trial magistrate erred in law and fact in failing to evaluate evidence on record such that she reached an erroneous decision.
2. That, the trial magistrate erred in law and fact in convicting the appellant basing on the case that was not proved beyond reasonable doubt.

3. That, the trial magistrate erred in law and fact in failing to determine that the victim's sense of truth was questionable as the victim failed to establish her proper age.
4. That, the trial magistrate erred in law and fact in convicting the appellant basing on the contradictory evidence.
5. That, the trial magistrate erred in law and fact in admitting Exhibit P1 without following the proper procedure.
6. That, the trial magistrate erred in law and fact in failing to furnish statements of the witnesses after the prosecution had mentioned the names of the witnesses as required by law thus prejudiced the interest of justice and rights of the Appellant.

During hearing of the appeal, the appellant was represented by Mr. Emmanuel Anthony, learned advocate whereas the respondent was represented by Mr. Innocent Njau, senior State Attorney.

In support of the appeal Mr. Anthony commenced his submission by abandoning the 5th and 6th grounds whereas

consolidating the 2nd and 4th grounds. He henceforth introduced yet a new ground (legal issue) to the effect that:-

> "The trial magistrate erred in law and fact in failing to follow the legal procedure provided for by section 127 (2) of the Law of Evidence Act, Cap 6 R.E. 2019."

The learned advocate proceed to submit that, **section 127(2) of the Evidence Act, Cap 6 R.E. 2019** (The Evidence Act) comprises of 2 conditions that, a child should 'promise to tell the truth' and secondly 'promise not to tell lies'. However, in the appeal at hand, it is evident from the trial court's proceedings at page 11, the victim who is a child of tender age did not make the above promises. In that regard, the procedure adopted by the trial court prior to taking the victim's testimony contravened the legal procedure. The learned advocate also argued, the above procedure is supposed to be conducted by the court while in the appeal at hand the proceedings reveal, it was the State Attorney who led the child thus, his evidence has to be expunged as held in the case of **Moses Raphael Lyego Vs. Republic, Appeal No. 58/2020 HCT (Mbeya)**.

It was Mr. Antony's further submission, the appellant was convicted on the evidence that was not proved beyond any reasonable doubt. One of the doubts was the fact that the appellant had already shifted six months after the ordeal happened. The question then is why didn't the grandmother not report the incident immediately much so the victim claimed to have notified her the very day. He cited the case of **Marwa Wangiti Mwita and Another Vs. Republic [2002] T.L.R 30** where the Court underscored the importance of naming the culprit at the earliest opportunity for avoidance of any doubts.

Mr. Anthony went on submitting, there was evidence that the victim's teacher knew the victim had a problem of defecating on himself while the victim neither revealed the ordeal to the teacher that befell him nor was the teacher summoned to give evidence on what he knew. That apart, the victim also testified that Mama Edom, (maternal aunt) had told him to mention Silas as the one who sodomized him. Considering the foregoing evidence the same was to be considered by the trial court wholistically. The learned counsel cited the case of **Majaliwa Ihemo Vs. Republic, CAT at Kigoma Criminal Appeal No. 197/2020**, supporting that,

despite the victim's evidence being the best evidence, the court should consider such evidence not only as a whole but cautiously. On the same footing the discrepancy in PW2 and PW3's evidence on how Silas came to be involved raises yet another doubt and a possibility that this is a fabricated case.

The learned advocate still on the same point asserted, the raised doubts however small in the circumstances must benefit the appellant as held in the case of **Jonas Nkize Vs. Republic, [1992] TLR 213** which spelt out the burden of proof in criminal cases is on the prosecution. Be as it may ordering the appellant to serve 30 years imprisonment (which is a severe sentence), the trial court was supposed to make a thorough analysis of the victim's evidence, ascertain the discrepancies and eventually would have found in his settled view, the appellant not guilty, as charged.

Regarding evaluation of evidence, Mr. Anthony added, the appellant had alleged he had grudges with PW2, but the trial court erred in making no mention of this fact as held in the case of **Pascal Yoya @ Maganga Vs. Republic Appeal No. 48 of 2017 CAT (Unreported)** that, the trial court upon evaluation of evidence had a duty to analyze the defence case. He

finally prayed this appeal be allowed and the appellant set free.

In reply, Mr. Njau on the upshot supported the appeal on the grounds that, **first**; The procedure laid down by section **127(2) supra** was not followed. The record does not show who made the preliminaries to interrogate the child and establish if he promised to speak the truth and not tell lies. He added, the law is clear and the Court of Appeal is at one that, the trial court's failure in recording the interrogations and child's evidence properly is fatal to the proceedings. It follows if PW3's evidence is expunged from the record, there will be no tangible evidence to incriminate the appellant with the charged offence, hence he ought to have been acquitted.

Second; Mr. Njau averred, the alleged grudges by the appellant were never mentioned or deliberated upon. Such failure was crucial as long as the trial magistrate only evaluated the prosecution case which contravened **section 312(1) of the Criminal Procedure Act Cap 20 R.E. 2019 (CPA)**. In other words, such judgment which is one sided cannot be a judgment in the eyes of the law.

Third; there was contradiction as to who reported the incidence to the police. PW1 testified she was the one who reported the incident while PW2 also stated was the one who reported the same to the police. **Fourth**; there is yet another controversy on who took the Victim to hospital. PW1 stated she was the one who took the child to hospital while PW2 and PW4 also claimed to have taken the victim to hospital. Considering the foregoing doubts he had highlighted, the learned Senior Attorney was of the settled conclusion the appeal be allowed.

After going through the trial court's record as well as parties' submissions, I as well support the appeal specifically on the fact that the case against the appellant was not proved at the required standard. However, before I proceed to analyze the doubts embodied in the prosecution case, I do not agree with both the appellant and the respondent's argument regarding how the victim's testimony was taken. Both parties argued that it is not clear how the test of truthfulness was done to the victim, (PW3), before giving his testimony. Whether the preliminary interrogation was done by the magistrate or the prosecutor, likewise, it is not shown whether the victim promised not to tell lies.

Section 127 (2) of the Evidence Act provides that: -

> *"(2) 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 any lies."*

In the case of **Philipo Emmanuel Vs. Republic, Criminal Appeal No. 499 of 2015 (CAT at Mbeya) (unreported),** the Court while making reference to the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016 which amended section 127 (2) of the Evidence Act, held that: -

> *"... [We] think it is instructive to interject a remark, by way of a postscript, that, of recent, this long standing requirement of a voire dire test was laid to rest upon the enactment of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016 which was promulgated on 8th July 2016. Through this Act, the provisions of subsections (2) and (3) of section were deleted and substituted with the following: "(2).* ***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 lies."
With this provision, the requirement of voire dire test has been effectively foregone."

In light of the above statement by the Court of Appeal interpreting the amendments to the relevant law, it is fair to say, it is no longer mandatory to conduct a *voire dire* examination, rather, the provision underscores the importance of a child before giving evidence to **promise** that, he/she shall tell the truth and not lies, failure of which such testimony will not have evidential value. The trial court's record at page 11 vividly reveals PW3 promised to tell the truth. The written and typed proceedings are slightly different with a number of typing errors hence I resort to the written script and PW3 is quoted as having said: -

*"**PW.3:-**. RK, 8 years old Shia Village, I am a Christian. My church is at Shia Church. Standard 3. I shall speak truth.*
***Court:-**Child swear and promised to speak truth. The child possessed enough intelligence"*

The trial court's findings that the child possess enough knowledge, clearly indicates that, it is the Court which

carried out the requisite preliminaries as required by law and not by the prosecutor as argued by the appellant. Consequently, a mere omission of the words **'not to tell lies'** is not fatal and the same can be cured by section **388 of Criminal Procedure Act** since it did not prejudice the appellant nor occasion any injustice. Even though, in my humble understanding, the fact that the victim promised to tell the truth, it implied automatically he will not tell lies. This ground therefore fails.

As briefly noted earlier, the case against the appellant was never proved beyond reasonable doubt, a standard long established in criminal jurisprudence. This can be seen from the victim's testimony against other witnesses' testimony. **First**; PW3, the victim, alleged on 30th October, 2020, the appellant sodomised him after he called him in his room and immediately thereafter, he notified his grandmother, (PW2). PW2 on the other hand testified that, the victim had a problem of defecating on himself at school and on the alleged date he came home with faeces in his underpants. She bathed him and gave him deworming medicine, but he kept on defecating on himself. They went to bed and on the following day the victim woke up with faeces in his pants and

it was when PW2 inquired from him if he was sodomised and PW3 affirmed and named the appellant as his assailant. This is contrary to what PW3 stated that when he reached home, he immediately told (PW2), his grandmother what had transpired.

Second; it is undisputed that the appellant had shifted from the alleged crime scene after the date of the alleged incident and according to the victim he was sodomised while the appellant was still living therein. The grandmother on the other hand testified although the appellant does not stay in her premises anymore, he sodomised the victim while he was still living therein. It is therefore not clear as to why wasn't the incident reported immediately thereafter to the authorities if at all it was true that the victim was sodomised.

Third; Exhibit "P1", a PF3 filled on 2nd November, 2020, after examination shows that the victim claimed to have been sodomised several times but in his testimony, he said the appellant sodomised him once. More so. The medical examination report did not show he was found with any bruises or injuries. However, it is my considered view that, for a 7 year boy to be penetrated through against the order of

nature by a male genitalia of a 32 years old man leaving such impact as passing stool uncontrollable, some blood, fresh bruises or injuries must have been plainly visible.

To cap it all, PW5, the Medical doctor who was giving expert opinion stated that, the problem of passing stool uncontrollably might be caused by penetration from a blunt object or the victim might have been born with such medical condition. It was therefore not conclusive which of the two was the victim's cause of passing stool uncontrollably.

Fourth; in his own words, the victim stated ***"mama mkubwa amesema nikija mahakamani niseme Silas amenifanyia hiki kitendo"*** which implies he might have been taught what to testify in court whether true or not. In that regard the victim's testimony was subject to scrutiny by the trial court. In the case of **Mohamed Said Vs. Republic, Criminal Appeal No. 145 of 2017, CAT at Iringa (unreported)** it was held *inter alia* at page 14 that: -

> *"We are aware that in our jurisdiction it is settled that the best evidence of sexual offences comes from the victim [**Magai Manyama vs. Republic (supra)]**. We are also aware that under section 127*

(7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for sexual offence may be grounded solely on the uncorroborated evidence of the victim.

However we wish to emphasize the need to subject the evidence of such victims to scrutiny in order for the courts to be satisfied that what they state contain nothing but the truth."

Further in the authority of **Mohamed Said Vs. The Republic, Criminal Appeal No. 145 of 2017 CAT at Iringa (unreported)** the Apex Court held: -

"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and Section 127 (7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases."

I fully associate myself with the positions laid above especially on the truthfulness of PW3's testimony, the same should not have been taken as gospel truth once it raised glaring doubts hard to ignore. As rightly submitted by both sides, there is hence a possibility of a framed case against the appellant leading to punishing the appellant to a sentence he did not deserve.

In the circumstances, the case against the appellant was not proved at the required standard to warrant his conviction. Consequently, from the above reasons, and as conceded by the respondent, I hereby allow the appeal, conviction entered against the appellant is quashed and sentence set aside. The appellant is to be released from custody forthwith unless held for a lawful cause.

It is so ordered.

B. R. MUTUNGI
JUDGE
1/04/2022

Judgment read this day of 1/04/2022 in presence of Appellant, Miss Magdalene Kaaya the Appellant's Advocate and Miss Mary Lucas (S.S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
1/04/2022

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
1/04/2022