IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 10 OF 2021

(Arising from the District Court of Rombo, Criminal Case No. 325 of 2019)

HENDRY STEPHANO SHIRIMA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

MUTUNGI .J.

In the District Court of Rombo, the Appellant was found guilty and convicted for **Unnatural Offence c/s 154 (1) (a) and 2 of the Penal Code, Cap 16 [R.E. 2002]**. He was accordingly sentenced to serve 30 years imprisonment.

It is alleged the accused on 13th day of November 2019 at about 22:00 hours at Mrao Village within Rombo District in Kilimanjaro Region, did have carnal knowledge of the victim (a boy of 10 years old) against the order of nature.

Before going to the merits or demerits of the appeal, I find it appropriate to give a brief background of what led to

the appellant's conviction. It is the prosecution case that, the victim a boy of ten years had all along been living with his mother and grandmother. Thereafter in 2019 the appellant came to collect him from his grandmother to assist him in his various activities including taking care of his goats. As time passed the appellant started sodomizing the victim. They would normally sleep in the same room and on the same bed. The appellant in pursuit of his evil lust would remove the victim's clothes and undress himself thereafter proceed to sodomize him.

Life turned out that the victim stopped schooling and would all the time roam around in different places with the appellant. The victim was also introduced to alcohol by the appellant. The appellant's wife who lived separately but in the same compound noticed the difference in the victim's behaviours and advised the appellant to return him back to his parents but he refused. She had noticed the two would spend a lot of time locked in the appellant's room which had only one bed. Reports of the unbecoming behaviour of the victim reached the area leaders and the victim's parents, who eventually came to collect him. As the victim's mother bathed him, she noticed when touched around his buttocks, the victim would feel pains.

When interrogated he narrated of how he had been sodomized by the appellant on several occasions. He could not report since the appellant had threatened to kill him and his family. The victim was taken to hospital and it was confirmed upon examination that, a blunt object had penetrated through his anus.

In his defence and after arrest, the appellant had admitted to have lived with the victim in the same room and slept on the same bed. On the other hand, his sister had explained, she had become uncomfortable by the act of the victim living with the appellant. The reason being, the appellant had mental problems which was the reason why he was not living with his wife in the same house.

In the end, the District court convicted the appellant and sentenced him to 30 years imprisonment as earlier noted in the judgment. Aggrieved by the lower court's decision, the Appellant has come through the window of appeal to this court on five grounds of appeal, to wit: -

1. That the trial court Magistrate erred in law and facts for entering conviction against the appellant basing the evidence of the child of tender age who did not understand the nature of telling the truth.

2. That the trial court Magistrate erred in law and facts for entering conviction and sentence without considering the Appellant's mental status.
3. That the trial court Magistrate erred in law and facts for ignoring the defence evidence thus prejudicing the appellant.
4. That the trial court Magistrate erred in law and facts for entering conviction and sentence basing on evidence which was not proved beyond reasonable doubt.
5. That the trial court Magistrate erred in law and facts for taking general consideration as to mitigation factors thus prejudiced the Appellant.

During the hearing of the appeal, the Appellant was represented by Mr Julius Focus learned advocate and the Respondent (Republic) was represented by Mr Filbert Mashurano, learned State Attorney. The appeal was argued orally.

On the first ground of appeal the Appellant's Counsel submitted, the victim (a child of tender age) did promise to tell the truth but not to tell lies as provided for by **Section 126 (7) of the Evidence Act**. It was vital that he promises

both to tell the truth and not to tell lies. In support thereof he cited the case of **Godfrey Wilson vs. Republic, Criminal Appeal No. 168 of 2018 (CAT – Bukoba) (unreported)**.

On the fourth ground of appeal, the appellant's counsel blamed the trial court Magistrate for convicting the appellant relying on the prosecution evidence tainted with doubts. The doubts emanate from the difference on the diverse dates mentioned in the proceedings. He pointed, the evidence of the victim (PW1) was to the effect that on 13th November 2019 is when he was sodomized and the act repeated several times. His father took him from the appellant's home on 14th November 2019 and on 15th November 2019 is mother noticed that he was sodomized. On the other hand, the victim's mother (PW2) alleged the victim's father took the victim from the appellant on 13th November 2019 and noticed that the victim felt pain when touched on the buttocks.

Another shadow of doubt created was on the victim's failure to mention the appellant at the earliest possible time. The prolonged period of 12 days from when the offence took place to the date when the medical examination was conducted was never accounted for. To put salt to the wound, the prosecution failed to call into

evidence the victim's father, who according to him was a material witness. He invited the court to the decision in the case of **Mwita Nyamuhanga vs Republic [1992] TLR 118**. He was of a settled view, all these doubts and contradictions go to the root of the case.

On the second and third grounds of appeal, the learned counsel faltered the trial court's failure to consider the defence of insanity as raised by the appellant's sister (DW2). He averred this was the reason the appellant could not cross examine the prosecution witnesses. The glaring health status of the appellant was never considered by the trial Magistrate. He argued further, even the judgement did not disclose whether the procedure was followed after the discovery of the appellant's mental status and this prejudiced the appellant's rights.

As for the fifth ground of appeal, Mr Julius Focus lamented, the trial Magistrate concentrated on the aggravating evidence by the prosecution and ignored the appellant's mitigating factors. He further explained the trial Magistrate was influenced by public opinion which formed the basis of the sentence.

In the end the learned advocate prayed the court does set aside the conviction and sentence metted out by the

trial court.

In response thereof, Mr. Mashurano learned Attorney on the first ground submitted, the proper section in support of the ground is **Section 127(2)** and not section 126(7) of the Evidence Act, Cap 6 R.E. 2019 as submitted by the Appellant's advocate. On the same ground he contended, the dictates of the provision were followed as seen at page 8 of the proceeding. The victim had promised to tell the truth as held in the case of **Godfrey Wilson (supra)**.

Responding to the second ground of appeal on the issue of insanity, the learned advocate argued, there is no place the Appellant raised the issue of his mental status. These were words testified by his witness who had no medical report. More so even the trial magistrate did not confine himself to section 127(1) of the Evidence Act (supra). He concluded by stating, the appellant understood the evidence and the questions posed to him and for that he was not prejudiced at all.

Reacting to the 3rd ground on failure to consider the defence's evidence, the Learned Attorney contended, the same was considered as seen at page 9 of the judgement and section 312 of CPA, Cap 20 RE 2019 was

adhered to. Citing the cases of **Mwita (supra)** and the case of **(Christian Kaale and another vs Republic, [1992] TLR 302)** the learned Attorney stated the appellant had a duty to cast doubts in the prosecution case. He went on to emphasize that, as per the case of **Woodmilton vs D.P.P [1935] AC 462** the prosecution's duty was to prove the case beyond reasonable doubt.

As to the 4th ground, the learned Attorney explained, the prosecution case was proved beyond reasonable doubt as per **section 110(1) of the Evidence Act, Cap 6** and the case of **Woodmilton (supra)** through their 4 witnesses. These were credible witnesses and as per the principle in the case of **Aloyce Maridadi vs Republic, Criminal Appeal No 208/2016 CAT-Mtwara** they were to be accorded credence in absence of reasons to doubt them. PW1's evidence was dully collaborated by PW2, PW3, exhibit "P1" (the PF3) as laid down in the case of **Aziz Abdalah vs Republic (1991) TLR 71.**

The foregoing notwithstanding Mr Mashurano further submitted, the appellant's innocence was demonstrated by his gesture of trying to run away and threatening to injure the ones arresting him with a machete "panga". More so the Appellant admitted residing and sleeping with

the victim in the same room and same bed. To cap it all, he admitted had no grudges with the victim.

As to the fifth ground, the learned State Attorney averred the appellant did not show how he was prejudiced by the judgement. In actual sense his mitigating factors were considered by the trial Magistrate.

Responding to the discrepancies highlighted by the appellant's counsel, the learned State Attorney contended, these can be cured by the operation of the Overriding Objective Principle and section 388 of the Penal Code Cap 16 RE 2019. The variation of dates and time are very minor as against the water tight evidence adduced by the prosecution.

The State Attorney concluded, the appeal has no merit and it deserves a dismissal. He called upon the court to consider the victim's tender age, hence as per section 154 of the Penal Code as amended by section 185 of the Law of the Child, 2009, the sentence should likewise be enhanced.

In rejoinder the Appellant's advocate conceded that in so far as the child's evidence is concerned the proper provision is **Section 127(2)** and not 126(7) (supra). He

reiterated his position that, the two conditions should be met that is promising to "tell the truth" and "not to tell lies".

Referring to the issue of insanity, the appellant after his defence had informed the court on the same, it was upon the trial court to mark the revelation and proceed as per section 216 of the Evidence Act (supra).

Commenting on the contradictory evidence the counsel stated, the appellant as a result did not understand the charge to the extent of preparing for his defence.

He concluded the appeal be allowed and order for a re-trial for the sake of justice.

Having critically analysed the submissions by both sides, painstakingly gone through the trial court records, I find it prudent to discuss one ground after another as presented in the petition of appeal.

Starting with the issue of evidence of the child, it is now settled in our criminal jurisprudence as submitted by the parties under **section 127(2) of the Evidence Act, cap 6** 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 any lies. "

From this provision the child before giving evidence has to **promise** that, he/she shall tell the truth failure of which such evidence will not have evidential value. In that regard the section imperatively requires a child of tender age to give a promise of telling the truth and not lies. See also the case of **Masoud Mgosi vs Republic Criminal Appeal No. 195 of 2018, Abdallah Nguchika vs Republic, Criminal Appeal No. 182 of 2018**.

The trial court's record at page 8 vividly reveals PWI promised to tell the truth, he is quoted as having said: -

"..., Keni, Mkoranda Primary school, standard three student, 11 years, promise to tell the truth before this court"

The mere fact that there is the omission of the words ***"not to tell any lies"*** is not fatal. It can be cured by section **388 of Criminal Procedure Act (supra)** since it did not prejudice the appellant nor occasion any injustice. The court was still informed and promised that the victim will "tell the truth", impliedly will not tell lies. The case of **Godfrey Wilson (supra)** cited by the appellant's counsel, is distinguishable from the

present case in that the circumstances are different. In that case the child did not at all promise to tell the truth and the same was not recorded by the trial Magistrate.

Regarding the second ground of appeal (on mental capacity of the Appellant), I had to revisit the trial court's record and as submitted by the learned Attorney it is only DW2 **Colleta Matei Urrassa** at page 24 of the proceedings who raised the issue of accused's insanity while testifying. It is trite procedure that the defence of insanity is covered under section 219 (1) of the CPA which states: -

> *"Where any act or omission is charged against any person as an offence and it is intended at the trial o f that person to raise the defence o f insanity, that defence shall be raised at the time when the person is called upon to plead."*

In the case of **Francis s/o Siza Rwambo vs Republic Criminal Appeal No. 17 of 2019 (CAT at D'SM)** the Supreme Court of this land held: -

> *"It should be understood that the law provides two separate procedures for a defence of insanity. If an accused person intends to raise a defence of insanity as a bar to a trial, in that, the*

accused person is incapable of standing trial, the procedure of raising it is provided under sections 216 to 218 of the CPA. Whereas, if an accused person wishes to raise it as a defence of insanity to a charge or information that at the time of committing the offence, he was insane, the procedure is provided under sections 219 and 220 of the CPA."

Since the accused did not raise this defence when he was called to plea to the charge, the proceedings do not suggest he was insane. He was able to submit his defence even after the closure of the prosecution case. The failure to cross examine witnesses is not a sign of mental incapacity of the accused/appellant.

On the third ground of ignoring the defence evidence, the accused called two witness in the defence case. His noble duty was to simply cast doubts in the prosecution case. That aside I have gone through the trial court's judgement at page 9 and found the following summary: -

"On his defence accused adduced that he is not the one who did such an act to the victim, also he has a mental illness however there was no evidence to prove the illness. Regarding to the

defence adduced I am of the view that accused defence does not dent the otherwise strong cogent and culpatory evidence that adduced by prosecution witnesses connecting accused with the offence, his culpability established to the required standard of proof beyond reasonable doubt."

The above proves the appellant's advocate wrong that the appellant's defence was not considered. It was in fact considered but did not shake the prosecution case.

On the issue as to whether the case has been proved beyond reasonable doubt, the appellant's advocate complained against the discrepancies as far as the dates are concerned, failure to name the accused at the earliest time and failure to call the appellant's father as a material witness.

On the issue of contradiction in dates, I find such contradictions by PW2 (mother) and PWI (the victim) not material to the case. These contradictions which will not dent the fact that the accused was sodomised and in no way shake the prosecution case.

On the issue of failure to name the accused at the earliest

time, I am alive with the principle that failure to name the accused at the earliest time may shake the credibility of the witness and raise doubts. I am fortified by the finding in the case of **Wangiti Mausa Mwita and others vs. Republic, Civil Appeal No. 6 of 1995** that: -

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his liability, in the same way as an unexplained delay or complete failure to do so should put a prudent court into inquiry."*

As per the trial court's record, the victim in the beginning reported the matter to his grandmother who was reluctant to believe the story and ordered the victim to return back to the appellant (at page 9 of the proceedings), where the victim is quoted as hereunder: -

> *"It was a Saturday and I returned to my grandmother I told her what accused did to me but she did not believed instead she blame me of telling lies, my grandmother refused to heard my complain and ordered me to returned back to accused person house, I went there and accused continued with his behaviour ya kunifanyia tabia mbaya."*

There is evidence that the victim had narrated the same story to his mother who too did not believe him and ordered to go back to the appellant's home.

There is also the evidence that the accused threatened the victim that he will kill his family and burn them in their house as to what happened to his young brother who had passed. Even though immediately his mother had noticed the pains the victim had, he mentioned the appellant as the culprit. The foregoing is sufficient evidence to hold, the incidence was reported at the earliest possible time that the victim got.

Further, I am alive with the principle that, failure to call a material witness the court is to draw an adverse inference thereto. See the case of **Boniface Kundakira Tarimo vs Republic, Criminal Appeal No. 350 of 2008 (unreported).** The issue is whether the father was the material witness in the given scenario. I find the answer is *'NO'* because he was to testify to the effect when he took the victim from the appellant's home, but this was not proof that the offence was committed. He took him because it was reported the victim was idle and roaming around, he was thus not a material witness in the case. Be as it may, the prosecution was free to choose any witness of its choice.

The trial court ruled and rightly so that, the best evidence in sexual offence comes from the victim. The victim testified on how the offence was committed and the court at page 8 to 9 of the judgement gave reasons upon which it convicted the accused which I find no reasons to differ with. The trial Magistrate was in a better position to test the credibility of the victim since the credibility of the witness is the monopoly of the trial court as held in the case of **Shaban Daud vs The Republic, Criminal Appeal No. 28 of 2000 (unreported)** which states: -

> "... ***Credibility o f a witness is the monopoly of the trial court*** *only in so far as demeanor is concerned, the credibility of a witness can be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person."[Emphasis added]*

As to the complainant that the trial magistrate failed to consider the mitigation factors, I will not toil much discussing this ground, since the punishment given is statutorily provided for under section 154(1) and (2) of the

Penal Code, Cap 16 R.E. 2019, that is life imprisonment or not less than 30 years imprisonment.

In the end, I find the case had been proved beyond reasonable doubt and the trial magistrate correctly convicted the Appellant. For the reasons mentioned, I therefore find the appeal lacks merit and the same is hereby dismissed entirely. It is so ordered.

B. R. MUTUNGI
JUDGE
17/06/2021

Judgment read this day of 17/6/2021 in presence of the Appellant, Mr. Focus Julius for the Appellant and Mr. Ignas Mwinuka (S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
17/6/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
17/6/2021