IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 6 OF 2021

(Originating from Criminal Case No. 63 of 2020 at Tanga District Court at Tanga)

JULIUS STEPHANO @ MTOI.....APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 15/07/2021
Date of judgment: 23/07/2021

AGATHO, J.:

The appellant was arraigned before the District Court of Tanga, charged with the offence of unnatural offence c/s 154(1)(a) and (2) of the Penal Code [CAP 16 R.E. 2019]. The particulars are that on the diverse dates between 15th day of February 2020 at Makorora area within the District, City and Region of Tanga the appellant did have carnal knowledge of one boy aged 9 years against order of nature. He pleaded not guilty, and the prosecution brought witnesses to prove their case. The court was satisfied that the case was proved beyond reasonable doubt and found the appellant guilty, convicted and sentenced him to life imprisonment. The

appellant was aggrieved by the trial court conviction and sentence hence this appeal on the following grounds:-

(1) That, the learned trial magistrate erred in law and fact by infringing section 26 of the Written Laws Miscellaneous Amendment Act No. 2 of 2016, since the victim (PW2) is a child f tender age as all procedures were not followed as required by the law.

(2) That the learned trial magistrate erred in law and fact by failing to notice the credibility of PW1 were undermined by the delaying to report immediately this abhorrent crime to the authority since the offence occurred on 15th day of February 2020 and the medical doctor (PW5) received the victim (PW2) for examination on 18th March 2020.

(3) That the trial magistrate erred in law and fact in not analysing the actual date of which the alleged offence was committed.

(4) That the trial magistrate erred on law and fact in not reading the exhibits which were tendered in court and in not allowing the accused person to cross examine the medical doctor.

(5) That the learned trial magistrate erred in law and in fact by convicting the appellant while erroneously failed to assess,

evaluate and analyse the whole evidence of the prosecution witnesses in order to arrive in the fair decision.

(6) The learned trial magistrate erred in law and fact by failing to notice that she was shifting the onus of proving the charge to the appellant.

(7) That the learned trial magistrate erred in law and fact by failing to realize that there was not any evidence which implicate the appellant with said offence.

(8) That the learned trial magistrate erred in law and in fact in not calling material witness from the crime scene including teachers as the offence was alleged to happen which was at school.

(9) That the learned trial magistrate erred in law and fact by failing to be meticulous enough in her judgment by failing to assign proper sentence awarded to the appellant.

(10) That the learned trial magistrate erred in law and fact by failing to consider the defence of the appellant.

(11) That the prosecution did not prove its case beyond reasonable doubt.

During the hearing the appellant was represented by learned advocate Mkilya, and the respondent was represented by Paul Kusekwa, State

Attorney. The appellant's counsel had the opportunity to start his submissions, and he began by submitting on the first ground of appeal.

Court determination of the grounds of appeal:

The firs ground of appeal relates to a question whether the trial magistrate did not observe the procedure provided for under section 127 of the Evidence Act [CAP 6 R.E. 2019] that contains Section 26 of the Written Law Miscellaneous Amendment Act No. 2 of 2016. On the receiving of testimony of a child of tender age (PW2 aged 9 years old). The Court of Appeal of Tanzania has in several occasions held this to be fatal. I must say this ground in itself is sufficient to dispose the appeal. However, I will consider other grounds of appeal as well as they have jurisprudential value.

The trial magistrate did not state the procedure taken in admitting PW2 testimony. For the sake of clarity, I will reproduce what is found on pages 8-10 of the proceedings because as will be explained later there is nothing in there that shows how the trial magistrate did abide to section 127(2) of the Evidence Act [CAP 6 R.E. 2019].

"Date: 27/08/202

Coram: H. A. Majani, RM

Pros: Ms. Muhangwa (S/A)

Accused: Present

C/C: Erica David

Pros: *The matter is for hearing we have one witness, so we are ready to proceed.*

Accused person: *I'm ready for hearing.*

Court: Prosecution case continues

Since the witness is of 9 years (below tender age let his credibility be tested by asking him some questions:

Court: what is your name?

Child: My name is Mohamed Zuberi.

Court: How old are you?

Child: 9 years old.

Court: Are you schooling?

Child: Yes.

Court: What is the name of your school?

Child: Mwenge Primary School.

Court: Which class?

Child: Standard III.

Court: Where do you live?

Child: Mabawa.

Court: With whom?

Child: I live with my mother.

Court: After testing his credibility by asking him question (sic) and due to his reply (sic) it shows that the witness is able to testify so let him give unsworn evidence.

Sgd: ..., RM

27/08/2020."

I asked myself whether the above proceedings meet the requirements of the law regarding procedure of receiving testimony of a child of tender age. PW2 being a child of tender age, in receiving his evidence there is certain procedure to be followed and it is provided for under Section 127 (2) of the Evidence Act [CAP 6 R.E. 2019]. The provision provides to the effect that the child must promise to tell the truth and not to tell lies.

These steps for receiving evidence of a child of tender age has been stated in the case of **Godfrey Wilson v. R., Criminal Appeal No. 168 of 2018 of Court of Appeal of Tanzania at Bukoba (unreported)** at pages 11-12. The steps under section 127 (2) of the Evidence Act [CAP 6 R.E. 2019] provide that:

The Court of Appeal of Tanzania also allowed the appeal because the trial court failed to observe the requirement set under section 127(2) of the of the Evidence Act [CAP 6 R.E. 2019] in the recent case of **Mwalimu Jumanne v R., Criminal Appeal No. 18 of 2019 (unreported)** decided on 12 May 2021. The Court of Appeal of Tanzania had also stressed on the need to observe the provision of Section 127(2) of the of the Evidence Act [CAP 6 R.E. 2019] in **Selemani Bakari Makota@Mpale v R., Criminal Appeal No. 269 of 2018 Court of Appeal of Tanzania at Mtwara (unreported) at page 13; Issa Salum Nambaluka v R., Criminal Appeal No. 272 of 2018 Court of Appeal of Tanzania at Mtwara at page 11 (unreported); Medson Manga v R., Criminal Appeal No. 259 of 2019, Court of Appeal of Tanzania at Iringa (unreported) at page 10** the Court of Appeal of Tanzania decisions on the procedure of receiving evidence of a child of tender age under section 127(2) of the of the Evidence Act [CAP 6 R.E. 2019]as amended by section

26 of the Written Laws Miscellaneous Amendment Act, Act No. 2 of 2016 extends to previous case of **Philipo Emmanuel v R., Criminal Appeal No. 499 of 2015 Court of Appeal of Tanzania at Mbeya (unreported)**. The prayer by the respondent's counsel even in the absence of the PW2 testimony the conviction can stand is unfounded because other prosecution witnesses' testimonies or evidence are corroborating evidence that have no independent evidence to corroborate.

The steps outlined by the Court of Appeal of Tanzania in receiving evidence of a child of tender age was provided in the case of **Godfrey Wilson (supra)**, first that section 127(2) of the Evidence Act [CAP 6 R.E. 2019] allows the child of a tender age to give evidence without oath or affirmation. Secondly, before giving evidence, such a child is mandatorily required to promise to tell the truth and not to tell lies. This was also reiterated in the case of **Msiba Leonard Mchere Kumwaga v R., Criminal Appeal No. 550 of 2015 (unreported)**. Looking at the records of proceeding in the trial court at pages 8-10 the steps stated herein above were not followed. In fact, a question as to the child's promise to tell the truth and not to tell lies was not asked by the trial magistrate. This is fatal as held by the Court of Appeal of Tanzania in **Godfrey Wilson's case** (supra) and the consequence is that the evidence

becomes valueless, and it is expunged from the records. Without further ado, I find the first ground of appeal to have merit.

With regards to the second ground of appeal the appellant's counsel faults the trial court's failure to notice lack of credibility of PW1 and PW2 due to their delay to report the crime to the authorities. The crime was alleged to have been committed on 15/2/2020 and it was reported on 18/3/2020, that is thirtyone (31) days later. It is also unclear why the matter was not reported to school administration. The mother of the victim (PW2) received the information about the crime on 12/3/2020 but she reported the incidence to the police on 18/3/2020, six (6) days later. This is shown on pages 6-7 of the trial court proceedings. There is no explanation why there was delay. The said delay raises doubt. In supporting the trial court decision. the counsel for the respondent submitted the charge sheet shows that the incidence took place at diverse dates between 16/2/2020 and 12/3/2020. He added that it was on 12/3/2020 when they PW2 family discovered the incidence. But the respondent's counsel admitted that the proceedings are silent as to what happened between 12/3/2020 and 18/3/2020. The appellant was arrested 19/3/2020. Certainly, the aforesaid delay raises some doubts on the prosecution case. Coupled with the quarrels between the mother of PW2 and the appellant mother, the doubts

are amplified. Page 2 of the trial court judgment contain information about the quarrels.

Although the appellant could have asked for explanation with regards to the delay in reporting the crime to the Police, but the prosecution ought to have mended such a hole in their case. I am aware of the case of **Goodluck Kyando v R., [2006] TLR No. 363** that a witness is entitled to credence unless there is a good and cogent reason for not believing him or her. The issue here is unexplained delay to report the crime to the police for six days. Any reasonable parent would not have delayed reporting such a serious crime without any justification. I am of a settled view that this delay creates doubt on the credibility of prosecution case. I therefore find the second ground of appeal to be solid.

The appellant counsel abandoned the third and fourth grounds of appeal. I therefore proceed to consider the fifth, sixth and seventh grounds of appeal because they are somewhat connected. They all focus on trial court's failure to evaluate prosecution's evidence, allegation of trial court shifting onus of proving the charge to the appellant, and lack of evidence which implicate the appellant on the offence he was charged with. Submitting on these grounds of appeal, counsel for the appellant argued that there was uncertainty on the location where the crime was committed.

The chargesheet shows that the crime was committed at Duga area within Tanga City (Duga is a ward). Surprisingly, all the prosecution witnesses never mentioned the area referred in the charge sheet. PW1 in her testimony she asserted that the crime was committed near Mwenge Primary School close to the Mosque in a pit (kwenye shimo in Swahili). That is seen on page 6 of the proceedings. PW2 on his side testified that the crime was committed Vichochoroni at Mwakizaro which is near Mwakizaro Primary School. This is shown on pages 10-11 of the proceedings and page 7 of the trial court judgment. Another contradiction relates to the class in which the victim (PW2) was studying. PW1 and PW2 himself said he is in standard III. In contrast to that PW3, WP Prisca said the victim is in standard V. All these are visible on page 13 of the trial court proceedings. The contradictions are many including where was the victim staying. Is it at the home of his father's brother, that is home of PW4 or he was staying with his mother (PW1)? The PW2 on the one hand testified that he was staying with his mother. PW4 on the other hand said that he was staying with the child (PW2)at Mabawa area. Surprisingly, while the PW2 said he was staying with his mother, PW1 did not say she is staying at Mabawa area. These inconsistencies raise doubts on the prosecution evidence.

The sixth ground of appeal was with respect to shifting of onus of proof to the accused/appellant. The counsel for the appellant cited the case of **D.P.P v Peter Kibatala, Criminal Appeal No. 4 of 2015 Court of Appeal of Tanzania, at Dar es salaam (unreported).** Yes, it true that the burden of proof in criminal cases is on prosecution and should not be shifted to defence. This was held in **Peter Kibatala's case** at page 15. I have looked at the trial court records of proceedings and the judgment at page 5, the trial court shifted the burden of proof to the appellant.

During submissions appellant's counsel abandoned the 7th ground of appeal. The trial court in refuting the defence evidence directed questions to the appellant and doubted his innocence. The trial court questioned even the quarrels/grudges between the mother of PW2 and the appellant's mother. The trial magistrate added if the accused was threatened by the mother of PW2 why he did not report it to the police. If it was mothers' quarrels, why was he arrested for unnatural offence? What about the PW2 who identified him as the one who had known him against the order of nature. Do they have grudges also? The trial magistrate went on pinning the appellant. If there were grudges between these mothers what about documentary evidence (exhibit P2) medical report and testimony of PW5 which confirmed that the PW2 was sodomized several times? If it could be

grudges, I hope the doctor's result could be different. I have paraphrased what the trial magistrate stated in the judgment at page 5. At some point I could see how the burden was shifted to the appellant. But at the same time, one could see how the trial magistrate forgot about the role of the court and started expressing doubts on accused's innocence. One could claim that the trial magistrate lost impartiality. This is against justice. The details are found in the trial court judgment at page 5. What is stated there is sufficient ground to allow the appeal. For that reason, I find merit in the 6th ground of appeal.

The 8th ground of appeal was to the effect that the material witness from school (teachers) were not called to testify. But from the proceedings the testimonies of PW2 and other prosecution witnesses did not show any indication that teachers or school management were aware of offence committed. It creates serious doubt because the alleged offence was committed close to school and during school hours. PW2 said the offence was committed during break time (this is found on page 10 of the proceedings). Surprisingly, PW2 did not report it to the school management. Although the prosecution has liberty of choosing witnesses to testify so as to build their case, in the present case neither the teachers nor the investigator were called to testify. The court being a custodian of

justice would have called the teachers to come and testify because the victim is their student. As already mentioned, this case is clouded with doubts in the prosecution case. Understandably, it might have been difficult for the trial court to decide which teacher(s) to call and from which school, Mwenge Primary School or Mwakizaro Primary School?

The respondent's counsel was of the view that the best evidence in sexual offences is the victim himself. This was also held in the case of **Selemani Makumba v R. [2006] T.L.R. 379 at Page 384**. According to the respondent's counsel in the case at hand the best evidence was that of PW2 and not the teachers or other his fellow students because during the commission of the offence other students were in the classroom. It was the victim (PW2) and the appellant who were present in the crime scene. The learned counsel also submitted that the observed contradictions are minor and should be disregarded as it was held by the Court of Appeal of Tanzania in the case of **Emanuel Aloyce Daffa v R., Criminal Appeal No. 131 of 2021 the Court of Appeal of Tanzania at Tanga (unreported)**, where the court held that in evaluating discrepancy and omission, it is undesirable for a court to pick a sentence and consider it in isolation from the rest of statement. The court must decide whether the

discrepancies and contradictions are only minor or whether they go to the root of the matter.

I have considered parties submissions on the 8th ground of appeal. I must say I disagree with the views of the respondent's counsel. The case at hand has many contradictions and inconsistencies, and they go to the root of the matter. As a result, I find the 8th ground of appeal to have merit. I sustain it.

The court proceeded to consider 10th ground of appeal because the appellant's counsel abandoned the 9th ground of appeal. On the 10th ground of appeal the appellant's counsel submitted that the trial magistrate did not consider the defence evidence. That is observed on page 5 of the trial court judgment. He went on submitting that the trial magistrate did not believe in the testimony of the appellant on the issue of grudges that existed between PW1, the mother of PW2 and the appellant's mother (DW2). These were co-tenants and had their quarrels, and the appellant tried to intervene. It was during his intervention when PW1 promised to show him. But the respondent's counsel said the defence evidence was considered at page 4 of the judgment, when one continues to read page 5 of the said judgment the trial court clearly doubted the defence evidence and that prejudiced the appellant. It was held in the case of **Shabani s/o**

Adamu Mwajulu and Baraka Msafiri Mwakapala v R., Criminal Appeal No. 131 of 2019, High Court of Tanzania, at Mbeya (unreported) that in establishing the guilty or innocence of the accused the court ought to consider both prosecution and defence evidence. It should be remembered that the issue of quarrels between the mothers was testified by DW1, DW2, DW3 and DW4. That should have raised some doubts in the mind of the trial court. Adding to that was the question of unexplained delay in reporting the offence to the Police.

Regarding the 11th ground of appeal the appellant's counsel submitted that the prosecution failed to prove the case beyond reasonable doubt. In totality of the submissions herein above it is clear that there were too many inconsistencies that created doubts and showed that the prosecution has not proved the case beyond reasonable doubt. Although the respondent's counsel prayed that the inconsistencies be treated as minor and be disregarded. He added that the best evidence is that of the victim (PW2). Regardless of that principle here we do not have PW2 testimony because it has been declared to be valueless and expunged from records because its reception in evidence was contrary to provisions of section 127 (2) of the Evidence Act [CAP 6 R.E. 2019]. Moreover, there are many doubts in the case at hand because the testimony has too many holes. I

find that the prosecution has failed to prove the case beyond reasonable doubt. Considering the foregoing, I uphold the 11th ground of appeal.

From the submissions above and considerations this court has made on the same and the law, I find the appeal to have merit. I allow it. The trial court conviction is consequently quashed, and the sentence entered is set aside. I order immediate release of the appellant unless held for other lawful reasons.

It is so ordered.

DATED at **TANGA** this 23rd Day of July, 2021.

U. J. AGATHO

JUDGE

23/07/2021

Date: 23/07/2021

Coram: Hon. Agatho, J

Appellant: Present with his advocate

Respondent: Absent

B/C: Alex

Court: Judgment delivered on this 23rd day of July, 2021 in the presence of the Appellant and his advocate, and in the absence Respondent's representative.

U. J. AGATHO

JUDGE

23/07/2021