IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO.103 OF 2020

(Originating from Kilwa District Court in Criminal Case No. 30 of 2020)

HASSANI MWICHANDE MPAMANDA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

2 June & 19 July, 2021

DYANSOBERA, J.:

In the District Court of Kilwa, the appellant, Hassani Mwichande Mpamanda, was arraigned vide Criminal Case No.36 of 2020 only for one count of unnatural offence contrary to section 154(1)(a) of the Penal Code [Cap 16 R. E 2019]. It was alleged that the appellant on 8th day of May 2020 at night hours at Mtoni village within Kilwa District in Lindi Region did have carnal knowledge to a boy aged 7 years old against the order of nature, who henceforth shall be referred to as "the victim" or "PW1" to conceal his identity. The prosecution presented four (4) witnesses and one exhibit in order to prove their case while in defence, the appellant gave affirmed evidence and had only himself as a witness.

The factual setting of the case as gathered from the prosecution side is that on 5.5.2020 PW3 sent the victim to the appellant due to his stubbornness. While at the appellant the victim used to sleep with the appellant on the same bed. On undisclosed date by PW1, PW1 slept with

the appellant. While sleeping, the appellant undressed PW1's pants and rub him with a saliva at the anus and eventually the appellant entered his penis. As a result, PW1 felt bad because of the pains he sustained. During the act, PW1 wanted to shout though was threatened by the appellant that he would have beaten him. Also, PW1 identified well the appellant since there was solar light and the appellant is his father. The next day on 9.5.2020 around the victim went to PW3 while crying told PW3 that he lost his shirt and was beaten by the appellant and stubbed on his hand with a knife. In addition, PW1 told PW3 that the appellant put his penis on his anus.

Thereafter, PW3 relayed that information to PW2 as a result they reported to the police and finally were given the PF3.Besides, on 9.5.2020 PW4 a clinical officer at Kilwa District Hospital received PW1 who had a PF3. PW4 examined the victim and found him to have been penetrated at his anus by a blunt object. Despite that, PW4 did not find the blood, semen and bruises at the anus of the victim. Though PW4 was also told by PW1 that the appellant had sodomised him three times. Whereas, PW2 testified that PW1 was sodomised on 8.5.2020 to 9.5.2020.

The defence by the appellant is featured with only the evidence of the appellant himself who completely denied to have sodomised his son(the victim).

After a full trial, the trial court was convinced that the prosecution case against the appellant was proved beyond reasonable doubt thus it convicted the appellant and meted a sentence of thirty (30) years term of imprisonment. The appellant is aggrieved with such conviction and

sentence meted against him thus he has appealed to this court on eight grounds of appeal which are as follows: -

1. That, the trial court erred in law and fact in convicting the appellant as the appellant pleaded not guilty when the charge was read over to him.
2. That, the trial court erred in law and fact in convicting the appellant because the victim was examined one day later after the alleged incident enough to grant possibility of fabrication of the evidence so as to illegally to incriminate the appellant.
3. That, the trial court erred in law and fact in convicting the appellant without considering that the whole case has not been proved beyond a reasonable doubt.
4. That, the trial court erred in law and fact in convicting the appellant due to the fact that the evidence of PW4 medical officer during examining the victim she did not found any some and bruises rather than penetrated by blunt object, hence can make a mere contradiction(sic) for the incident to appear from the victim.
5. That, the trial court erred in law and fact to convict and sentence the appellant because the prosecution evidence was incredible and unreliable regarding that PW4, the medical officer does not prove the existence of the penile penetration hence it is very necessary ingredient in order to the offence of unnatural to stand therefore the court was wrong to convict the appellant while acting under insufficient evidence of the prosecution side as it left reasonable doubt.

6. That, the trial court erred in law and fact in convicting and sentencing the appellant without being satisfied on the identity of the appellant. This is due to the fact the alleged offence was committed during the night time hence it is a trite law that when the offence is committed at night there must be a proper identification to identify who committed the offence.
7. That, the trial court erred in law and fact in convicting and sentencing the appellant based on hearsay evidence specially for those of PW2 and PW3 both of them no one who witnesses the appellant committing the alleged incident rather than to hear from the victim.

ADDITIONAL GROUNDS OF APPEAL

1. That the trial magistrate erred in law and facts by convicting and sentencing the appellant while the charge sheet was incurable defective as it cited non existing sub-section of the law under the Penal Code section 154 has no paragraph(i). The charge sheet failed to specify the particulars of offence which was fatal. The appellant was unfairly tried since he failed to know exactly what he was foe in order to start preparing his defence section 154 of the Penal Code has three different scenarios failure to specify which among the three scenarios of offence amounted into failure to specify the offence committed by the appellant hence failure of the prosecution to perform its duty properly, this shortfall is capable of concluding this appeal as held by High Court of

Tanzania at Mtwara in Criminal Appeal No.5 of 2019 Mohamed s/o Abdallilah Ching'oma Vs. Republic(P.J. NGWEMBE,J)unreported.

2. That the trial magistrate failed to comply effectively with section 192 of the Criminal Procedure Act, though the facts read there was no offence which was disclosed in the facts as adduced by the Public Prosecutor.
3. That the trial magistrate erred in law and facts by relying on the evidence of PW4 and exhibit P. E, 1 was unprocedurally tendered and admitted as exhibit. Though PW4 described how he can identify the alleged exhibit P.E.1.Furthermore exhibit P.E.1 in court, PW4 was told to read exhibit P.E.1 but through the records in the proceeding (10) nowhere in recorded if PW4 read the exhibit P.E.1.Though this shortfalls evidence of PW4 and exhibit P.E.1 should be expunged from the records.
4. That the trial magistrate erred in law and facts by convicting the appellant while the offence was not proved beyond reasonable doubt. Evidence of PW4 had a lot of doubts and it was a piece of evidence which could here proved penetration if really PW 1was canalized.PW4 narrated that he (PW 4) never saw any bruises in PW1's annus, although the alleged incident claimed to happen on 8/5/2020 by the time PW4 was examining PW 1 it hasn't clasped those 10 to 12 hours that can make the bruises to disappear, furthermore findings of PW 4 contracts on how PW4 came to identify that PW1 penetrated without having bruises.The alleged victim failed to prove the exact date the alleged offence occurred.
5. That the trial magistrate erred in law by filling to comply with the provisions of section 312(1) (2) of the Criminal Procedure Act Cap

20 R. E 2002.The trial magistrate mad plain references to the evidence adduced without showing how the said evidences is accepted as true or correct, the trial court did not single out in the judgment the points determination, evaluate the evidence and make findings facts there on. The defence of the appellant was not considered in the alleged judgment through this appellant was deprived of having his defence properly considered.

6. That the appellant prays upon your honourable court to act upon its powers vested on the Criminal Procedure Act section 369(Cap 20 R.E 2002) the appellant by the time the alleged was committed was not in a position to do such an act due to ill health condition the appellant was suffering from Hernia and Hdrocele disease a situation whereby someone cannot do any sexual act and underwent operation at Kilwa Masoko Health Center on 18/10/2020 medical report attached.

When this appeal was called on for hearing on 2.6.2021 the appellant appeared unrepresented, in person and fended himself. Whereas, the respondent/Republic enjoyed the services of Mr. Paul Kimweri, the senior State Attorney. The appellant initiated the hearing by submitting that he had filed a total of 13 grounds of appeal and emphasised the victim is his child and was told to have sodomised him. The appellant went further and submitted that he could not do that since the victim lived with his mother and he is a person of 71 years old. Apart from that, the appellant insisted that he has two children and the problem is with the probate and administrator that is why the case is cooked.

In response the learned senior State Attorney, submitted that the evidence of PW1 on which other witnesses relied was not consistent on

what and how he related to other witnesses. The learned senior State Attorney emphasised that there is no consistency as such the evidence is not credible.To fortify his argument he submitted that PW1 told different stories since he told the trial court that the act was committed once and reported the following day to his aunty.Whereas,PW2 a paternal uncle of PW1 testified that the PW1 told him that he was sodomised on 8th and 9th May 2020.Also,PW3 Asha Mwichande (aunty of PW1) told the trial court that after the incident the victim went to her home on 9th May 2020 and narrated to her what had happened in the night of 8.5.2020.In addition, the victim told PW4 that he was sodomised three times.

Thus, the learned senior State Attorney took a view that PW1's evidence was not credible since there is no coherence and the relationship between the evidence of an individual as compared to those other witnesses. To substantiate his argument, Mr. Kimweri referred this court to the case of **Galus Kitaya V. R**, Crim. Appeal No. 196 of 2015 (Mbeya) whereby the Court used that criterion and thus, Mr. Kimweri was of the view that the evidence of PW1 was not credible and the trial court did not weight well the evidence of PW1 which was inconsistence. Finally, the learned senior State Attorney supported the appeal.

The appellant did not rejoin. Thus, he paved the way for this court to look on merits of this appeal.

The appeal has not been contested by the respondent, before me for determination is whether the prosecution case was proved against the appellant to the standard required. In resolving this fundamental question, I shall confront some important issues raised in the grounds of

appeal before this court. In determination of this appeal, I shall first deliberate on threshold grounds addressing points of law. With regard to the first ground of the additional grounds of appeal whereby the appellant complained to have been convicted and sentenced on the defective charge. This complaint was not addressed by the learned senior State Attorney during hearing though I think it is imperative to resolve it now by reproducing an excerpt of the part of the charge being complained by the appellant as follows: -

"**STATEMENT OF THE OFFENCE**

UNNATURAL OFFENCE C/S154 (1) (a) of Penal Code Cap 16 Vol. 16 of the Laws (RE 2019)

PARTICULARS OF THE OFFENCE That HASSAN S/O MPAMANDA charged on 8th day of May,2020 at night time at Mtoni Village within Kilwa District in Lindi Region did have carnal knowledge to one "PW1" aged 7 years old against the order of nature."

According to the appellant's complaint, is that, the trial court convicted and sentenced him contrary to section 154(i) of the Penal Code [CAP. 16 R.E. 2019]. Indeed, the charge arraigned against the appellant was not defective in its content since it featured the proper particulars of the offence of unnatural offence. Though it has missed subsection 2 of section 154 of the Penal Code(supra) which establishes punishment to an offender who has committed the offence to child under the age of eighteen years. In the present case the charge and the evidence of PW2, PW3, PW4 and exhibit PE 1 in totality have proved that the age of the victim was seven years old when the offence was committed. Thus, the charge sheet ought to feature subsection 2 of

section 154 of this Code which contains the proper sentence against the appellant and not as it appears in the record of the trial court. At this juncture I think it is important to have an extract of the section 154(2) so as justify how the charge ought to have appeared and assisted the appellant that he was facing a serious offence. According to the Penal Code(supra) herein below is an extract of the section 154(2) which is as follows: -

> "154 (2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."

I am aware that this irregularity is curable under section 388(1) of the Criminal Procedure Act [CAP. 20 R. E. 2019] as the Court of Appeal emphasised in the case of Jamal Ally Salum vs. Republic, Criminal Appeal No.52 of 2017(unreported) where it held that: -

> "Where the particular of offence are very clear in the charge then irregularities over non citations and citations of inapplicable provisions in the statement of offence are curable under section 388(1) of the Criminal Procedure Act Cap 20 R.E. 2019."

Though there is a litany of the authorities of the Court of Appeal which have discussed the significance of including the punishment provision in the charge sheet. For instance, in the case **Zarau Issa vs. Republic**, Criminal Appeal No.159 of 2010(unreported) the Court observed on the importance of citing a punishing section in the charge is "laying the foundation of proceedings." Whereas in the case of John Martin Marwa vs. Republic, Criminal Appeal No.20 of 2014 is to comply

with the requirement of the law. Also, in the case of **Abdallah Ally vs. Republic**, Criminal Appeal No.253 of 2013(unreported) the Court of Appeal held that: -

"The wrong and or non-citation of the appropriate provisions of the Penal Code under which the charge is preferred. Left the appellant unaware that he was facing a serious charge of rape."

More so, in the case of **Mussa Nuru Saguti vs. Republic**, Criminal Appeal No.66 of 2017 CAT at Tanga (unreported), the Court of Appeal stated on the other significance of indicating the punishing section in the charge is to enable the accused persons to be in a position to prepare an informed defence. See **Simba Nyangura vs Republic**, Criminal Appeal No.144 of 2008(unreported). Indeed, what I was trying amplify is to show the trial court and the prosecution the importance of preparing and filing a charge which is well prepared in terms of the offence levelled against the appellant by observing all important features of the charge but not as is in the present case. Also, as I have said before herein that this irregularity of not including the proper punishing provision of the law in the statement of the offence of the charge is curable under section 388(1) of the Criminal Procedure Act (supra).

Besides, what I have also grasped from the impugned judgment is that the learned trial Magistrate misdirected herself in applying the charging provisions of the law. In the impugn judgment the learned trial Magistrate at the first paragraph of page one wrote and I quote: -

"Accused person Hassani Mwichande Mpamanda stand charged with. one offence to wit un natural offence c/s 154(i) of the Penal Code CAP RE 2019."

Also, at the third paragraph of page three of the typed judgment of the trial court, the learned trial Magistrate convicted the appellant by using section 154(i)(a) of the Penal Code(supra) which is quoted as follows: -

> "This court convict the accused person under S.154(i)(a) of the Penal(sic) CAP 16 RE 2019 as the case has been proved beyond reasonable doubts by prosecution against the accused person."

In addition, at the second paragraph of page 7 of the impugned judgment the learned trial Magistrate meted a sentence of thirty years imprisonment term against the appellant by using section 154 (i) (a) of "this Code" which is also quoted as follows: -

> "Accused person is sentenced to serve thirty years (30) imprisonment in jail c/s 154 (i) (a) of the Penal Code CAP 16 RE 2019."

The above extracts have prompted me to find the Penal Code [CAP. 16 R.E. 2019] which establishes the offence of unnatural offences. As far as this case is concerned, the offence of which the appellant was charged with as per charge is established under section 154(1)(a) of "this Code" and for the interest of justice and understanding it is significant to reproduce the said provision of law as follows:

> "154. -(1) Any person who-
>
> (a) has carnal knowledge of any person against the order of nature;

commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years."

In the light of the above arguments, it is apparent clear that the learned trial Magistrate misapplied the provision of the law and instead she invented her version of the provision of the law which does not exist at all in the Penal Code [Cap. 16 R. E. 2019]. Bad enough, she convicted and sentenced the appellant on the provision of the law which does not exist in the statute. So, what is the effect of convicting and sentencing the appellant on a non-existing provision of the law? There is no controversy that the trial court did not comply with the mandatory requirements of the provisions of sections 235(1) and 312(2) of the CPA.These provisions enact that once the trial court finds an accused person guilty of the offence charged it is duty bound to enter conviction and later shall pass a sentence. Thus, section 235(1) provides: -

"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."

Also, as far as section 312 of the CPA is concerned, reminds the courts of law on the content of the judgment. I think it will be unwise to let it go without reproducing the said provision of the law for better understanding on the learned trial Magistrate, Prosecution side and the

appellant that judgment of any court of law must comply with the law of the statute as it is in the CPA. Section 312 of the CPA is as follows:

"312. -(1) Every judgment under the provisions of section 311 shall,

except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.

1. In the case of conviction the judgment shall specify the

   of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.

2. In the case of an acquittal the judgment shall state the

   offence of which the accused person is acquitted and shall direct that he be set at liberty.

3. Where at any stage of the trial, a court acquits an accused

   person, it shall require him to give his permanent address for service in case there is an appeal against his acquittal and the court

   shall record or cause it to be recorded."

As regarding the present case, I am interested on subsection 2 since the appellant was convicted by the trial court on the offence of unnatural offence. This subsection required the learned trial Magistrate to specify the offence of which, and the section of the Penal Code or other laws under which, the appellant was convicted and the punishment to which he was sentenced. Sadly, the learned trial Magistrate in her judgment did specify the offence of unnatural offence and although she specified the section of which does not exist either in our Penal Code in convicting and sentencing the appellant as exhibited herein above on the quoted excerpts from the impugned judgment. In short, the impugn judgment is not a judgment at all/is incompetent judgment since it failed to adhere to the charge which arraigned the appellant in the trial court and conviction was entered in something which is a nightmare.

This requirement was underscored in the case of **Hassani Mwambanga vs. Republic**, Criminal Appeal No.410 of 2013, CAT (unreported) where the Court observed that: -

> "...no sentence can be passed or imposed on an accused person unless and until he or she been duly convicted of a particular offence."

In addition, the Court put more emphasis in the case of **Oroondi Juma vs. Republic,** Criminal Appeal No.236 of 2012 CAT (unreported), that: -

> "Non compliance with the requirement to convict the accused as directed under sections 235(1) and 312(2) of the CPA rendered

the judgment of the trial court incompetent..."

Having found that the appellant was not convicted on the offence he faced with in the charge. And I am reminded by the law that no sentence may be passed or imposed unless and until that was done, it follows that the sentence which was imposed by the trial court was illegal.

Apart from that, I really concede with the learned senior State Attorney that the incompetent judgment of trial court features the evidence of the prosecution witnesses with inconsistencies as pinpointed by Mr. Kimweri but which leaves a lot of desires. First of all, the testimony of PW1 does not show when the appellant had carnal knowledge with him against the order of nature. Also, PW1 did not testify as to the number of penetrations the appellant did to him rather it was PW2 and PW4 and exhibit PE1 which in total shows the number of penetrations PW1 experienced from the appellant. Also, the evidence of PW2 shows that the victim was penetrated throughout from 8/5/2020 to 9/5/2020 and is not disclosed when the appellant stopped penetrating the victim on the said date. Besides, the evidence of PW4 and exhibit PE1 shows that the victim was penetrated by the appellant three times thought the evidence of the victim whose evidence is the best evidence in rape cases in proving penetration is silent. Now if really the victim was either penetrated by the appellant from 8/5/2020 to 9/5/2020 or three times then why the examination made by PW4 as seen in his testimony and exhibit PE1 shows that there was sign of anal penetration though there was a slight wideness. So the major concern is how PW4 found a slight wideness of the anus while the appellant either penetrated the victim continually for two days or three times and bad enough there

were no semen, bruises or blood which could have proved that the victim was really penetrated by the appellant on that number as stated by PW2 and PW4.This creates doubts as to the prosecution case since the evidence is not straight forward in proving the offence of which the appellant was charged with.Besides,there are inconsistencies as submitted by Mr. Kimweri in the evidence of PW1,PW2,PW3 and PW4. To understand what I trying explain, the following extract of the evidence of PW1, PW2, PW3, PW4 as seen at pages 6,7,9 and 10 of the typed proceedings of the trial court and some of the contents of exhibit PE1 are reproduced as follows: -

> "At page 6 ...one day when we are sleeping with accused, accused undressed my pant; Accused rub saliva in my anus and entered his penis in my anus, I felt bad, it was paining. I wanted to shout. Accused threatened to beat me."
>
> At page 7 ...PW1 was sodomised on 08/05/2020 to
>
> 09/05/2020...said he is sodomised by accused"

At page 9...On 09/05/2020 around 12:00 hours I was at my home, with Mwanaidi Abdallah my aunt.PW1 came crying...PW1 proceeded to narrate to me that accused put his penis on his anus. I asked him why he didn't tell me immediately.PW1 said accused warned he will beat him. At page 10 ...PW1 who narrated he was sodomized by accused three times... I examined the victim and found the victim is penetrated on his anus. Anal intercourse, I didn't found blood in his anus. I didn't found semen nor bruises. If the victims take bath you cannot see semen. Bruises can stand for 10 of 12 hours then it disappears. Identified the

victim was penetrated by a blunt object. It was slight wideness in his anus.

Exhibit "PE 1" General Medical History (including details relevant to the offence)-The kid reported...of his father having anal sex with him three times

Description of physical state of and injuries to genitalia including anus established penetration in case of anal intercourse-Anal intercourse anus wide,no sperms, no bruise no blood.

MEDICAL PRACTITIONER REMARKS

This kind need to undergo counselling and good care from both families. This is a sign penetration due to anal wideness, however was a slight wideness."

Regarding the pinpointed inconsistencies and contradictions in my settled view are not minor but they go to the root of the matter since the learned trial Magistrate failed to resolve them when was possible and really it has affected the prosecution case. Though I am aware on that not every discrepancy in the prosecution case will cause the prosecution case to flop. But it is only where the gist of the evidence is contradictory then the prosecution case will be dismantled. See the case of **Said Ally Ismail vs. Republic**, Criminal Appeal No.249 of 2008(unreported). Also, in the case of **Mohamed Said Matula**

vs. Republic [1995] TLR 3 whereby the Court observed as follows: -

> "When the testimonies by witnesses contain inconsistencies and contradictions the court has a duty to address the inconsistencies and try to resolve them when possible. As the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter"

In view of the above, I am of the settled view that the inconsistencies and contradictions alluded occasioned failure of justice on the appellant. And if the trial could have weighed well the evidence of PW1 in relation to the evidences of PW2, PW3, PW4 and exhibit PE1 it could have not convicted and sentenced the appellant.

As to the complaint that the appellant's defence was not considered. I have scanned the entire impugn judgment and I have no hesitation that the defence of the appellant was not considered under the objective evaluation. At the last paragraph of page 5 of the trial court judgment the learned trial Magistrate only summarized of the appellant as it is seen at page 15 of the proceedings. Though she only stated that the appellant's denial to the charge could not exempt him from liability. Nowhere the learned trial Magistrate considered the evidence of the appellant in relation to the ingredients of the offence of unnatural offence. I think the learned trial Magistrate ought to have subjected such piece of evidence to a critical analysis or objective evaluation in order to separate chaff from the grain.

Regarding the pinpointed and evaluated anomalies, I think and I am of the firm view that the mistakes done were greatly attributed by the

trial court thus, the appellant cannot be blamed and punished rather he beseeched this court to allow his appeal and set him free. Also, I do not think ordering a retrial will be appropriate at this stage since it will enable the prosecution to fill in the gaps on the anomalies shown by this court.

In the upshot the appeal succeeds and is allowed. The conviction is quashed and sentence meted out to the appellant is set aside. Consequently, I order that the appellant Hassani Mwichande Mpamanda be released from prison custody forthwith unless held there for some other offence.

Order accordingly.

W.P. Dyansobera

JUDGE

19.7.2021

This judgment is delivered under my hand and the seal of this Court on

This 19th day of July, 2021 in the presence of the Hassani Mwichande Mpamanda, the appellant and Mr. Wilbroad Ndunguru, learned Senior State Attorney for respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

JUDGE