—ORIGINAL—

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

PC CRIMINAL APPEAL NO. 115 OF 2020

(Appeal from the decision of the Resident Magistrate Court of Arusha at Arusha (Hon. C. Chitanda, Esq. SRM), in Criminal Case No. 394 of 2018)

CHARLES JOHN.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

26th July & 06th September, 2021.

MZUNA, J.

Charles John, the appellant herein is challenging the conviction and sentence. He was sentenced to 30 years imprisonment after being convicted by the Resident Magistrates' court of Arusha for the offence of Unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, [Cap. 16 RE 2019].

The brief background of the case as per the charge sheet is that on diverse dates and August of 2018 at Sokoni I area within the City, District and Region of Arusha, the appellant did have carnal knowledge with one DG (abbreviated for the purpose of hiding the identity of the child) a boy of ten years old against the order of nature, the act which contravenes criminal law.

It was alleged as per the prosecution evidence led by PW1, the victim, PW2 Godfrey Abraham Mollel as well as PW3 Lilian Michael Mollel (the victim's father and mother respectively) and PW4 Freedom Eliezer Makiago, the Doctor who filled the PF3, that the appellant did sodomize the victim. According to PW1, the appellant met him playing at home. He then took him up to the river. Upon reaching there, he asked him to take off his clothes. He then sodomised him. Thereafter he gave him Tshs 500/-. He went to school on the following day. He informed his teacher.

The information leading to the arrest of the appellant was after the teacher had notified the victim's father (PW2). He arrested the appellant and then reported him to the Police Station. The matter was reported to the Hospital for medical examination. PW4 confirmed that indeed he had been sodomised as evidenced by the PF3 (exhibit P1).

In his defence, the appellant (DW1) denied to have committed this offence, though he admitted to be related to PW2 and PW3. According to his wife, DW2 Mary John Mollel, the victim was forced by his parents to name the appellant. They raised issue of a delayed arrest (two months) as proof that the charge was a framed one.

The trial magistrate in convicting the appellant based his findings on the evidence of the victim as it was a sexual case as well as the evidence of the Doctor, PW4. She was satisfied that indeed the charged offence had been

proved to the required standard of proof. She was satisfied that the accused/appellant was responsible to the sodomisation.

Being dissatisfied, the appellant has filed this appeal praying to quash and set aside both the conviction and sentence on the following grounds:- **1.**That, there was an error on the part of the trial Magistrate for noncompliance with mandatory provision of section 127(2) of the Evidence Act, Cap. 6.; **2.** The trial magistrate convicted without evidence showing that the appellant was properly identified. **3.** That the judgment was premised on the evidence not properly scrutinized and evaluated, instead the judgment was based on contradictions between witnesses; **4.** Failure by the trial magistrate to realize that the prosecution failed to call key witnesses; **5.** N/A (withdrawn). and **6.** N/A (withdrawn).

During hearing of this appeal which proceeded by way of written submissions, the appellant was represented by Mr. Allen Gordian, the learned Advocate whereas, the respondent Republic had the service of Ms. Akisa Mhando, the learned State Attorney. Mr. Gordian opted to drop ground No. 5 and 6, leaving four grounds of appeal only as summarised above.

Reading from the four grounds of appeal, the main issue(s) are:- One, whether the trial magistrate complied with the requirements of the law in recording the evidence of the child of tender age, including to tell the court the truth not lies? Two, whether the trial magistrate relied on the prosecution

evidence which was contradictory in its nature thereby prejudicing justice. Three, whether the identity of the person who committed the offence was not ideal such that there was need to conduct identification parade? Four, whether material witnesses were not called leading to injustice?

On ground one, Mr. Gordian contended that the trial court contravened section 127(2) of the Law of evidence Act, [Cap. 6 R.E 2019] (herein after TEA) as amended by Miscellaneous Amendment No. 2 of 2016 which directs the manner in which the evidence of a child of tender age shall be taken. Mr. Gordian went on arguing that, after DG the victim being concluded that he doesn't know the meaning of an oath he proceeded to give evidence without the trial magistrate asking him to promise telling the truth as per the law.

To buttress his position, Mr. Gordian referred this Court to the cases of **Joseph Damian versus Republic**, Criminal Appeal No. 294 of 2018 (Unreported) particularly at page 10 of the judgment and **Mustafa Ramadhan vs Republic** [2006] TLR 323. Due to such reasoning and argument, the learned advocate asked this Court to nullify the impugned proceedings and judgment.

In response, Ms. Akisa Mhando the learned State Attorney, in her submission supported the appeal. She said, the evidence PW1 (DG) lacks evidential value as the mandatory procedure envisaged under section 127(2) of the T.E.A, was not followed. To support her arguments, she cited to this

Court the cases of **Shaibu Nalinga vs The Republic,** Criminal Appeal No. 34 of 2019 CAT at Mtwara (unreported) where the case of **Salumu Nambaluka vs Republic,** Cr. Appeal No. 274 of 2018 was cited with approval. She made further references to the case of **Godfrey Wilson vs R,** Cr. Appeal No. 168 of 2018 (unreported) cited in the case of **Shaibu Nalinga vs The Republic** (supra). It was her view that in view of the shortfalls envisaged in the way the recording of the PW1 was done by the trial Magistrate, she prayed for this court to expunge the evidence of PWI as it has no value on the eyes of the law.

The evidence as per the trial court record, shows, the age of the victim (DG) at the time the alleged offence was committed, he was ten years old. He falls within the category of the definition a child of tender age in accordance to section 127(4) of the Law of Evidence Act, [Cap. 6 R.E 2019]. The said provision of the law states:

> *'For the purpose of subsection (2) and (3), the expression "child of tender age" means a child whose apparent age is not more than fourteen years.'*

The procedure in recording the evidence of such a child is well stipulated under section 127(2) of the T.E.A which reads:-

> *"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" *(Emphasis added)*

That procedure was equally emphasised in the cited cases of **Joseph Damian versus Republic** and **Shaibu Nalinga vs The Republic** both unreported (supra). For a better understanding, I find it opportune to cite and reproduce what was stated in the case of **Issa Salum Nambaluka versus The Republic,** Criminal Appeal No. 272 of 2018 CAT at Mtwara (unreported) which cited with approval the case of **Geoffrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported). The Court of Appeal observed;

"We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions/which may not be exhaustive depending on the circumstances of the case as follows:

1. The age of the child.

2. The religion which the child professes and whether he/she understands the nature of oath.

3. Whether or not the child promises to tell the truth and not to tell lies."

The law as above reproduced requires the court to at least be satisfied that the witness a child of tender age, after asking few pertinent questions like whether or not the child witness understands the nature of oath. This is followed by the promise to tell the truth and not to tell lies. This is the position of the law.

Sadly, the records of the trial court particularly at page 10 of the types proceedings shows that mandatory procedure was not complied with. It reads;

> ***PW1:*** *DG, 10 years Lalashiye, Student of Standard three at sokoni I primary School, Christian.*
>
> *He doesn't know the meaning of oath.*
>
> ***XXD*** *(sic) by State Attorney (Rose Sulle)*

The Magistrate proceeded to record the evidence. The anomaly which has been subject for criticism is that before giving evidence, he was required to promise to tell the truth and not to tell lies. In the circumstances therefore, I agree with both Mr. Gordian and the learned State Attorney that in this case, the procedure used to take PWl's evidence contravened the provisions of section 127(2) of the Evidence Act. For that reasons, I allow the 1st ground of appeal. I proceed to expunge the evidence of PW1 which was received contrary to the provisions of section 127(2) of the T.E.A because in view of the decision in the case of **Joseph Damian @ Savel v. the Republic** (supra) it lacked probative value.

The case laws support the view that even without the evidence of the victim, court can still proceed to act and convict (see the case of **Issa Ramadhan v. Republic,** Criminal Appeal No. 409 of 2015, CAT (unreported), cited with approval in the case of **Joseph Damian @ Savel v. the Republic** (supra).

The question which fallows is whether there is other evidence which the court can rely on to convict. According to Mr. Gordian the learned counsel and this takes me to the second issue, there is contradicting evidence of the prosecution witnesses. He faulted the trial magistrate based on discrepancies and contradictions of prosecution witnesses especially PWI (DG), PW2 the father of DG and PW3 on the issue of identification of the suspect.

Such contradictions, according to the learned counsel, is that while DG testified that he knew the appellant because he normally sees him swimming at the river where he used to fetch some water, PW2 said that after interrogating DG he said that he didn't know the culprit unless he visually identifies him. At the same time PW2 said that DG told him that the appellant is the shoe shiner which in turn manifested for his arrest.

That PW3 the mother of DG gave different version of the story that DG told her that the one who sodomized him was Charles John. To him, such kind of misinformation precisely required identification parade to cure the contradiction than relying solely on visual identification and warrant conviction. To this effect, he cited the case of **Waziri Amani vs Republic** [1980] TLR 250 in order to remove all possibilities of mistaken identity.

This ground of appeal was also argued in tandem with ground No. 3, on analysis of the evidence. Mr. Gordian argued that, despite contradictions between prosecution witnesses, the trial magistrate failed to properly evaluate

the evidence on record. He said, the prosecution evidence casted a lot of doubts which could not be relied upon to conclude the guiltiness of the appellant. It was his view that the conviction was not proper.

He insisted based on the case of **Aziza Abdallah vs. Republic** [1991] TLR 71 that a key witness was a school teacher of DG who is alleged to have been told the story to him first. He is the one who interrogated DG at the first place and called parents to tell them the tale. He said, failure to call such teacher creates the gap which, reasonably if considered would have not convicted the appellant.

On her part, Ms. Mhando submitted that, so long as the evidence of PW1 has been expunged from the record, the remaining evidence is that of PW2 and PW3 which contradict each other. That it creates doubt. She referred this Court to the contradictory party of evidence as was submitted by Mr. Gordian. The learned state attorney cited the case of **Jeremiah Shamweta vs Republic** [1985] TLR 228 on the different version of story by witnesses on the same scene crime. She is of the firm view that the conviction and sentence was not properly arrived at.

The nagging question is whether it is the appellant who committed this offence. PW1, the victim never mentioned the person who committed the offence to PW2, his father. He is quoted to have said that:-

"...After the treatment again I interrogated my son and asked him if he knew the person sodomised him, ***he told me that he does not know his name, but if he will see him he will show me,*** *he told me that he is a shoe shine (sic) guy and he know (sic) where he is working. We went together up to the shoe shine office. and be arrested..."*

(Emphasis mine).

The arrest was done by PW2 together with one Aminiel Thomas. It was at 06.30 AM. They took him up to the Police station. On the other hand, the version given by PW3 the Victim's mother was that:-

"...As a parent I asked him who sodomised him? ***He told me it was Charles John who sodomised him****...Victim father was the one who went to the school and took him...The accused used to sodomise my boy at unfinished house or at the river where he used to go and fetch water... The accused was arrested in September, 2018."*

(Emphasis mine)

The above evidence shows, PW2 was the first person who received the victim (PW1) from school. He is the person who interrogated him first. According to PW2, he was taken where the accused works. But one wonders, why is it that PW1 gave different versions on the person who committed the offence. I would agree with Mr. Godian the learned counsel that it was important to call the school teacher who first received the story from PW1. Failure to call the said teacher, makes this court to draw adverse inference that if he was called would have given evidence adverse to the prosecution case as it was so held in the case of **Aziza Abdallah vs. Republic** (supra). I

say so while fully aware in view of the provision of Section 143 of the TEA, that *"no particular number of witnesses shall in any case be required for the proof of any fact".*

Another equally important point is the fact that the inconsistencies on the prosecution evidence of PW2 and PW3 points to "reasonable doubts" which points to the innocence of the appellant. It was held in the case of **Jeremiah Shamweta vs Republic** (supra), the position I associate myself with, that:-

> *"...The discrepancies in the various accounts of the story by the prosecution witnesses give rise to some reasonable doubts about the guilt of the appellant."*

The trial magistrate, purports to rely on the famous case of **Seleman Makumba v. Republic** [2006] TLR 384 which emphasised that "in sexual offences, the true evidence comes from the victim." I would say, there was no evidence of the victim which could support such version because it was received without satisfying itself (court) on whether he promised to tell the truth not lies.

There are unanswered questions. Even the evidence of the Doctor, PW4 shows the medical examination was done on 14th October, 2018. The Doctor certified that there were no external injuries but had ***"loose anal sphincter."*** The offence was committed in August 2018. PW3 said the

arrest was done in September 2018. There was a delayed arrest. DW2 raised this point when she said:-

> *"We asked them why did they come on that day and not in August, they said that they were doing investigation..."*

One wonders, if the appellant was known to the arresting persons, why is it that they had to wait until September, 2018 as alleged by PW2? More important, the examination as per the PF3 and evidence of PW4 was done on 14th October, 2018. There was a delayed arrest and of course reporting. It was held in the case of **Marwa Wangiti Mwita and Another v. Republic,** Criminal Appeal No. 6 of 1995 (unreported), which was cited with approval in the case of **John Gilikola v. The Republic,** Criminal Appeal No. 31 of 1999, CAT at Mwanza (unreported) that:-

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

The delayed arrest of the appellant suggest that the credibility of PW1, PW2 and PW3 and their reliability are questionable.

The prosecution evidence fell short of proving the charge to the required standard of proof. I agree with both Mr. Godian the learned counsel for the appellant and Ms. Akisa Mhando, the learned State Attorney, that the conviction and sentence cannot be allowed to stand.

That said, I set aside both the conviction and sentence imposed on the appellant. I proceed to order that the appellant be release from prison unless otherwise lawfully held.

Appeal allowed.

M. G. MZUNA,
JUDGE.
6th September, 2021.