IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 29 OF 2021

(Original Criminal Case No. 278/2020 of the Kasulu District Court, before Hon. I.D. Batenzi - RM)

RASHID RAMADHANI ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

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JUDGEMENT

10/9/2021 & 3/11/2021

L.M. MLACHA, J.

The appellant, Rashid Ramadhani was sent to the District Court of Kasulu in Criminal Case No. 278 of 2020 charged of 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 that he had carnal knowledge of Aman S/O Samwel, a child aged 9 years old against the order of nature on 2/10/2020. He was found guilty, convicted and sentenced to the mandatory sentence of 30 years.

The record reveals that PW1 Dr. Eyelyne Masamu was on duty on 5/10/2020 at 9:30 am when he received PW2 Amani Samwel, a child aged

9 years. He was brought by a certain woman. He was informed that the child had been sodomized. He questioned PW2 who said that he had been sodomized several times. He checked his underpants which was wet with feces. On further examination, he saw bruises at the sphincter muscles. He concluded that he had been penetrated by a blunt object at his anus. He filed the PF3 which was tendered as evidence during trial.

At the trial, PW2 was asked and a made promise to tell the truth. The court recorded his evidence without oath or affirmation. His evidence real that he was drug by the appellant during the night on 1/10/2020 and entered to the house of Adelina where he was undressed by the appellant who inserted his penis (kidudu) in his anus (mfutuni). He was thereby sodomized by the appellant who threatened him not to tell anybody or else he could kill him. But later released the story to his grandmother leading to the arrest of the appellant. PW3 who is the mother of PW2 got the reports and rushed only to see her child in a bad condition. PW2 told her that he had been sodomized by the appellant. PW4 WP 9163 DC Eva was the investigator. She interviewed PW2 and recorded his statement containing what has been said above.

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The appellant who was the only defence witness denied to commit the crime. He denied the allegations. The trial magistrate found that there was good evidence to convict and proceeded to convict him as pointed out. Aggrieved, the appellant has now come to this court by way of appeal.

The grounds upon which the appeal is based can be put as under: -

1. *That, the trial Court Magistrate erred in law and fact by putting into consideration to the weak evidence provided by prosecution side and pass sentence against the appellant despite of lack of reliable ingredients that constitute the offence of unnatural offence with which he was convicted.*
2. *That the trial court magistrate erred in law and fact by convicting and sentencing the appellant relying on the weak evidence adduced by PW2 and hearsay evidence adduced by PW3 and PW1 which was not sufficient to prove the case in the standards of proof required in criminal cases.*
3. *That the trial court erred in law and fact by convicting and sentencing the appellant despite the existence of contradictions and doubts in prosecution witness.*
4. *That the guilty of the appellant was not proved beyond reasonable doubt as required by the laws.*
5. *That, the trial magistrate erred in law and fact by convicting and sentencing the appellant regardless of the existence of inconsistences in the testimonies of prosecution witness on material points.*

6. *That, the proceedings were a nullity because the provisions of the section 127 (6) of the evidence act were not complied with.*
7. *That, the trial magistrate erred in law and fact in disregarding the appellant defence and failure to consider the principal that the accused can not be convicted basing on weaknesses of his/her defence but on strength of prosecution evidence adduced and proved against him.*

The appellant appeared in person while the respondent Republic was represented by Mr. Robert Magige, State Attorney. When the appellant was asked to argue his appeal, he opted for the state attorney to start while reserving his right of rejoinder. Mr. Robert supported the appeal. He said that the appeal is based on the evidence of PW2 who is a child of tender age but his evidence was recorded contrary to section 127 (2) of the Evidence Act, Cap 6 R.E. 2019. He went on to say that the court was supposed to examine if he could give evidence on oath or not and then proceed to ask him to promise to speak the truth and not lie. Counsel submitted that PW2 promised to speak the truth in page 11 of the proceedings but the court did not ask him the test questions. He referred the court to **Issa Salum Nambaluka v. Republic**, Court of Appeal of Tanzania, Criminal Appeal No. 272 of 2018, page 12 to see the procedure of recording evidence of children of tender age. He added that the crime was committed during the night but PW2 did not explain the source of light. He was supposed to say the way he

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could identify him as per the case of **Waziri Amani v. Republic** [1980] TLR 250. Further PW2 said that there were three other people at the scene of crime but it was not shown why they could not be called as witnesses. He argued the court to allow the appeal.

The appellant made a rejoinder and argued the court to set him free because the evidence adduced by the victim did not meet the legal standards.

I have considered the grounds of appeal and the submissions made by the parties. I have no problem with the failure to give details of light for the evidence shows that PW2 was picked from the house of one God and moved with the appellant to be given 'cones'. He knew the appellant and moved with him for a considerable distance before he was finally drugged to the house where he was sodomized. The circumstance does not give doubts of identification. He knew the person he was dealing with whom he had walked for a considerable distance making the case of Waziri Amani distinguishable. In the like manner I don't think that failure to call some other people can have any negative impact to the prosecution case because the prosecution has a right to choose and bring witnesses of their own choice. There is no law which compel the prosecution to call a particular witness only that if they

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fail to bring key witnesses they face the consequences of failing to prove their case.

My problem is on the failure to follow the procedure contained under section 127 (2) of the Evidence Act and the consequences. The record of the District Court reveals the following at page 11: -

> ***"PW2 Amani Samwel, 9 years, Murusi, student, Christian.***
>
> ***Court****: The witness is a child of tender age. He is asked to make a promise to tell the truth.*
>
> ***Signed I.D. Batenzi RM***
>
> ***3/11/2020***
>
> ***Witness****: I promise to tell the truth and not lies.*
>
> ***Court****: The evidence of a tender child is received.*
>
> *Signed I.D. Batenzi RM*
>
> *3/11/2020*
>
> ***XD BY PP***
>
> *I am called Aman Samwel ..."*

The state attorney says that the procedure contained in section 27 (2) of the Evidence Act was not be followed properly and I think he is correct.

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Section 27 (2) of the Evidence Act was given judicial consideration in **Issa Salum Nambaluka** (supra). The court had this to say in pages 9-13.

> *"It is undisputable fact that at the time of giving evidence, PW1 was a child of tender age. Section 127 of the Evidence Act defines who a child of tender age is ... a child whose apparent age is not more than fourteen years. According to the record, at the time of giving her evidence, PW1 was aged 14 years thus fitting the definition of a child of tender age. Her age was not more that 14 years. The procedure for taking the evidence of a child of tender age is provided under section 127 (2) of the Evidence Act ....*
>
> *From the plain meaning of the provisions of subsection (2) of section 127 of the Evidence Act ... a child of tender age give evidence with oath or making affirmation or without oath or affirmation. This is because the section is crashed in permissive terms as regard the manner in which a child witness may give evidence.* ***In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies.*** *Section 127 of the Evidence Act is however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not.*
>
> *It is for this reason that in the case of* ***Godfrey Wilson v. Republic,*** *Criminal Appeal No. 168 of 2018 (unreported) we*

stated that, ***where a witness is a child of tender age, a trial court should at the fore most, ask few pertinent questions so as to determine whether or not the child witness understand the nature of oath.*** *If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not tell lies. In the above case we observed as follows: "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."(Emphasis added)*

Looking at the procedure laid down by the Court of Appeal and what was done by the magistrate, one can see clearly that the evidence of PW2 was recorded contrary to section 127 (2) of the Evidence Act. It was recorded illegally so to speak. The question is what should be done? The state attorney and the accused have the view that I should allow the appeal and set the

appellant free. With respect to the views of the state attorney, I have a different opinion. I think the court should be balanced and check the position of the victim as well. In this regard, I feel persuaded by the views of the Supreme Court of India made in **Ritesh Sinha Verus State of Uttar Pradesh and Another**, Criminal Appeal No. 2003 of 2012 available on line at *https//Indiankanoon.org* when it was said as under:

> "***The processual law so dominates in certain system as to overpower substantive rights and substantial justice.*** *The humanist rule that procedure should be the handmaid, not the mistress, of legal justice. compels consideration of vesting a residuary power in Judge to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable...I must sound a pessimistic note that it is too puritanical for a legal system to sacrifice the end product of equity and good conscience at the altar of processual punctiliousness and it is not too radical to avert a breakdown of obvious justice by bending sharply, if need be, the prescriptions of procedure.* ***The wages of procedural sin should never be the death of right.***"
> [Emphasis is ours]

The Court of Appeal had a similar observation in **Haruna Mpangaos and others versus Tanzania Portland Cement Co. Ltd,** Civil Application No. 98 of 2008 page 18 when it said:

"There is no way in which the court can now turn its back against its own mistake and through the blame to the applicant alone."

Coming to our case, one can see that the errors were done by the court not the victim of crime. This error should not therefore be used as a peg to take away the rights of the victim of crime or give the accused an unjust benefit. If the magistrate failed to follow the procedure of recording the evidence of a child of tender age it does not mean that the crime was not committed. We should not therefore act in a manner which will allow procedural sins committed by the court to affect or take away the rights of the victim which may otherwise be in existence. This is one of scenarios is where the famous saying quoted above; ***The wages of procedural sin should never be the death of right;*** *should come to play.*

It is for this reason that I have the view that this is not a fit case to allow the appeal based on the errors and set the appellant free who should have otherwise been in prison if the procedure had been followed. It is a case, fit for revision and not otherwise.

With that in mind, I exercise the revision jurisdiction of this court contained in section 44 (1) of the Magistrates Courts Act, Cap 11 R.E. 2019 to revise and vacate the proceedings and judgment of the district court. I

direct the case to start a fresh before another magistrate of competent jurisdiction who should record the evidence of the victim following the procedure contained in section 127 (1) of the Act as interpreted by the Court of Appeal and outlined above. It is ordered so.

L.M. Mlacha

JUDGE

3/11/2021

Court: Judgement delivered in chamber in the presence of both parties. Right of appeal explained.

L.M. Mlacha

JUDGE

3/11/2021