IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 87 OF 2021

(Original from District Court of Rufiji at Kibiti in Criminal Case No. 151 of 2019)

SAIDI MOHAMED KADURU ---------- APPELLANT

VERSUS

THE DPP ---------- RESPONDENT

Date of Last Order: *20/09/2021*

Date of Ruling: *29/09/2021*

JUDGMENT

MGONYA, J.

The Appellant **SAIDI MOHAMED KADURU** being dissatisfied with the Judgment and orders passed by the District Court of Rufiji at Kibiti, in **Criminal Case No. 151 of 2019;** where he was found guilty, convicted and sentenced to save **Thirty (30)** years imprisonment, do hereby appeal against the whole of the said decision to this Honourable Court on following grounds:

1. ***That, the Learned Trial Magistrate grossly erred both in law and fact to convict and sentence the Appellant based on unreliable prosecution***

evidence of PW4 (victim) who did not promise to tell the truth before adducing his testimony before the Court, contrary to the Mandatory Provisions of Section 127 (2) T.E.A as amended by Act No. 4 of 2016.

2. ***That, the Learned Trial Magistrate grossly erred both in law and fact after stepping into the shoes of the victim and becoming a witness when he said and stated that, the stick which pressed into the buttocks of the victim as the victim testified was the penis of the Accused now the Appellant. The Magistrate failed in his duty of clarifying what the victim meant by the stick in the time he (victim) was adducing his evidence, hence wrongly conclusion, conviction and sentence to the Appellant.***

3. ***That, the Learned Trial Magistrate grossly erred in law and fact to convict and sentence the Appellant based on the evidence of PW4 (victim) while the Magistrate did not give the chance to the Accused now the Appellant to cross – examine to the victim (PW4) which is totally contrary to procedure of Law i.e T.E.A.***

4. ***That, the Learned Trial Magistrate grossly erred both in law and fact to convict and sentence the Appellant after failing to note that, there was no possible explanations given by the Prosecution witnesses regarding the under delay of taking the victim to hospital for examination, if he was real indeed molested (sodomized) as alleged since on 25/09/2019 where the accident occurred to 28/09/2019 where the victim was taken to Hospital for check-up. this left some crucial matters.***

5. ***That, the Learned Trial Magistrate grossly erred in law and fact to convict and sentence the Appellant based on Exhibits i.e PE. 1 (PF3) (sketch map) which were not read out loudly to the Accused before the Court as required by procedure of law, hence denying (unjustice) the Appellant an opportunity to understand their contents.***

6. ***That, the Learned Trial Magistrate grossly both erred in law and fact to convict and sentence the Appellant based on unreliable, contradictory,***

incredible and improbable Prosecution evidence which raises some doubts and shows all signs indicates that the Prosecution Case was malicious, fabricated and planted to the Appellant.

7. ***That, the Learned Trial Magistrate grossly erred both in law and fact to convict and sentence the Appellant while the charge (offence) was not proved beyond any reasonable doubt and to the required standard of law.***

Wherefore, the Appellant humbly prays to this Honourable Court to allow his Appeal by quashing the conviction, set aside the sentence and set him at liberty.

It was the Appellant's submission that he prays that his grounds of appeal be adopted and considered in this appeal and from the same this appeal be allowed.

Responding on the appeal the Respondent through ms. Imelda Mushi, the learned State Attorney stated that on the 1st ground as per section **127 of the Evidence Act Cap. 6 [R.E 2019]** the requirement of the same were not adhered to during trial. In the event therefore, they support that there was an anomaly to that effect. The Respondent then referred this Court to the case of **GODFREY WILSON VS R., Cr. Appeal**

No. 168 of 2018 CAT at Bukoba, where the Court ruled out that not adhering to the Provisions of **Section 127 (2) of TEA makes the testimony of witness to be of no weight.**

Further, the Respondent on 3rd ground was of the contention that **there was no cross – examination of the victim that is PW4,** of which the is reflected on page 9 of the proceedings. By doing so the Appellant did not cross examine the victim and that he was not given a fair trial; as seen in the case of ***GIFT MAUA VS OTHERS, Civil Appeal No. 289 of 2015.***

It was averred by the Prosecution that the Appellant from the above anomalies, was not afforded a fair trial.

As the victim was a key witness and as seen her testimony lacked important ingredients. It is from the submission by the Respondent that they pray for a **re-trial** so as the same can meet the end of justice.

Having gone through the grounds of appeal and the submissions of the parties it is here that I determine the appeal as follows.

With regards to the anomaly that has been identified by the Appellant and the fact that the Respondent supported the anomaly that the requirements of **section 127 of the Evidence Act (supra)** were not complied with hence

amounting to the evidence of the victim to have no weight. The case of **MASANJA MAKUNGA VS. REPUBLIC, Criminal Appeal No. 378 of 2018**, expunged the evidence of a Child for failure to have complied with **section 127 of the Evidence Act (supra).**

It is trite law that in sexual offences the best evidence is the evidence of the victim herself. See the case of ***SELEMANI MAKUMBA VS REPUBLIC, [2006] TLR 379.*** The circumstance in this case is of same nature and I too believe that the best evidence to the offence the appellant is charged with would be that of the victim himself.

Considering that the evidence adduced by the victim before the Court and being a witness testifying on actually what he faced between him and the Appellant the same ought to be given weight because it is the victim and none other that went through the forbidding act upon him by the Appellant. I find that the victim's testimony calls for consideration and the same be given considerable weight according to evidence that will be procured and proved.

Referring on the fact that cross examination was not conducted in the Trial Court to PW 4 who was the Victim as a result of the Trial Court forming an opinion that PW 4, fears the Accused hence no cross examination or re-examination was conducted. It is my firm opinion that the laws of the Land

ought to be adhered to unless an exception is provided by the same. Restricting application of procedural law in the business of the Court leads to an unfair trial for the procedure being faced with an irregularity which may render a matter be retried.

The fundamental issue for consideration before ordering retrial is the interest of justice to the affected party. In this case the issue is whether the interest of the Appellant and the interest of justice will be preserved when the order for retrial is issued? There are several precedents on similar issue including the case of ***FATEHALI MANJI VS. R [1966] E.A. 481*** where the court held:

> **" a retrial be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence at the trial. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it".**

Having observed the irregularity for doing away with the procedure of cross examination and re-examination for reasons

stated by the Court of which have no legal bases renders the proceedings to have been illegal/nulity.

On the circumstances reiterated above, I am of the firm view that the Appellant and PW 4 were not accorded with a fair trial. **Hence this ground of appeal is meritious and holds water. It is sufficient enough to dispose the appeal in its entirety.**

On the way forward, I order an expedicious retrial for the interest of Justice. The Appellant to remain in custody pending his retrial.

It is so ordered.

L. E. MGONYA

JUDGE

29/09/2021

Court: Ruling delivered in my chambers in the Clemence Kato, State Attorney for the Respondent and Ms. Veronica, RMA.

L. E. MGONYA

JUDGE

29/09/2021