**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**CRIMINAL APPEAL NO. 95 OF 2021**

***(Originating from criminal case No. 152 of 2019 at Musoma District Court)***

**KAJI HAMISI ABDALLAH..... APELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

4th October and 15th November, 2021

**F.H. MAHIMBALI, J.:**

Kaji Hamis Abdallah, the appellant was arraigned before the district court of Musoma for the offence of unnatural offence contrary to section 154 (1)(a) and (2) of the Penal Code [ cap 16 R.E. 2019]. It was alleged by the prosecution that on different dates between September 2018 and 18th October, 2019 at Iringo Mlimani in Mara region, the appellant had carnal knowledge of one AB (real name of the victim disguised so as to protect his identity) a boy of 9 years against the order of nature. The trial court heard the matter and the appellant was convicted and sentenced to life imprisonment.

The brief background facts leading to this case are as follows;

The head teacher of Iringo primary school (PW1) testified before the trial court that on the 4th of November, 2019 after his English lesson, one standard four student (Doto Thimoth) informed him that he saw the appellant making love with the victim. He told the student to go see him in his office. The student also told him that Latifa and James had also witnessed the incident. The headmaster called Latifa, James and their teacher (Aziza James). Aziza also informed the head master that she had received information that the victim was sodomized by the appellant. The victim admitted to have been sodomized by the appellant since September, 2019 to October, 2019. The victim told them that he was sodomized four times and the appellant gave him money and told him not to tell anyone. AB also testified before the court that the appellant had sodomized him by inserting his penis into his anus five times and warned him not to tell anyone. The appellant also used to give him money. When the victim was asked by Semeni where he got the money from, he said he got it from the appellant.

PW1 reported this matter to the police station , they were given a PF3 and he was accompanied by Doto, Latifa, AB, Mwahija and Aziza. They went to the hospital and AB was attended to by Willy Fanuel Dishon ( PW2) a doctor at Musoma Referral Regional hospital on the 4/11/2019. After, attending to the victim, his report stated that AB was

sodomized as his anus had changed in colour, it was black in colour and it had developed "sugu" and the victim felt pain when it was touched as his anus was penetrated. PW2 filled in the PF3 and signed it. He also prayed to tender it in court and it was admitted and marked as exhibit P1 in court without any objection from the appellant.

The testimony of the victim and the headmaster was corroborated by the testimony of the victim's father (PW3) who stated that his son (AB) was born in 2010 and in October, 2019 he was at Chato and he was informed that AB was found with 1,000 tshs and was asked to take his parents to school. Semeni accompanied AB to school and AB stated that he was given money by the appellant and the appellant (Kaji) used to sodomize him. When AB's father returned from Chato the doctor informed him that his son was sodomized and he also testified that the appellant was their neighbour.

The trial court ruled that the prosecution side had established a prima facie case against the appellant and found him with a case to answer.

The appellant fended for himself under oath and he had no witness to supplement his testimony. He stated that on the 5th of November, 2019 during his secondary school examination he was arrested by police

officers. He was not informed of the offense he had committed. He was brought before the court. He also said that he never asked the headteacher any question because his testimony was hearsay and the doctor never conducted any medical examination on him. He further stated he does not know the victim.

The trial court held that the prosecution side had proved its case beyond reasonable doubt and convicted and sentenced the appellant to life imprisonment. This decision did not amuse the appellant.

In bid to challenge the decision of the trial court and prove his innocence the appellant has raised eight grounds of appeal in his petition of appeal. The grounds of appeal can be summarized as follows;

1. That the trial court erred as the prosecution evidence is weak and they did not prove their case beyond reasonable doubt.
2. The trial court erred as PW4 evidence is silent on when and where the victim was sodomized.
3. The trial court erred as exhibit P1 was not read out in court.
4. The trial court erred as the evidence of PW1 and PW3 's evidence is purely hearsay evidence.
5. The trial court erred as it did not comply with section 210 (3) of the Criminal Procedure Act.

6. That, the trial magistrate erred by not complying with section 127 (2) of the Evidence Act.
7. That, the trial magistrate twisted the evidence of PW1, PW2, and PW4.

When this matter came up for hearing, the appellant was present and enjoyed the legal services of Advocate Emmanuel Werema while the respondent was also present and represented by Malakela , State attorney.

Submitting in support of the appeal, Adv. Werema submitted on the first ground that this case has not been proved beyond reasonable doubt. PW2 stated that the examination was done on the 4/11/2019 but the charge shows that the offense was committed on the 18/10/2019. Therefore, there is a lapse of 18 days from the date of the commission of the offense to the date of examination. He doubted the authenticity of PW2's report. At page 10 of the typed proceedings, the appellant had already been accused of sodomizing AB before PW2's report. He doubted the doctor's opinion.

He further submitted that the anus being black in color, it is not necessarily because of sodomy as opined by PW4. The fact that the anus was painful by touching it is doubtful. He stated that the anus is a

delicate part of the human body hence it depends on how it was pressed to cause pain. The doctor did not state on how he pressed on the said zone. The doctor also did not state if the anal splinter muscles were relaxed or not and if the anus had bruises. At page 8 of the typed proceedings, it was PW1's testimony that the appellant had sexual intercourse with Mwaija and not the victim. Aziza also told the head master that the victim once sodomized PW4. It was his observation that the prosecution did not prove its case beyond reasonable doubt.

Replying, to the first ground of appeal, the respondent stated that this ground is meritless. The doctor had testified clearly that when doing physical examination to the victim's body he noted the anus was black and it had " sugu". Having "sugu" is not normal. The doctor also testified at page 10 of the typed proceedings that he observed that there was anal sexual penetration on the victim. He went further to state that the doctor was experienced as he was able to determine a perforated anus and non-perforated anus. The pain the victim felt when his anus was pressed is due to the injury on the anus. The victim and Mahija were both sodomized (see page 8). He prayed this ground to be dismissed.

Rejoining, the appellant stated that presence of "sugu " is not a conclusive proof that there was sexual penetration. Sexual penetration entails inner part while the "sugu " is outer . Top part of the anus is not conclusive proof. It is a mere saying by PW2. It was his submission that there is a possibility that PW4 was forced to testify.

With regards to the second ground of appeal, it was the appellant's grief that the prosecution did not state when and where the victim was sodomized. The appellant submitted that at page 15 of the typed proceedings, the evidence is that the appellant had led the victim to Kamara but at page 5 , the scene of the crime was at mountain Thus, the prosecution testimony was contradictory.

The respondent objected to this ground by stating that considering the age of the victim (9 / 10 years), it is not possible for him to recall the dates and places but he mentioned one of the places. It was his opinion that this ground is devoid of merits.

Rejoining, the appellant stated that the respondent's reply is not supportive. When exhibit P1 is expunged, the conviction against the appellant cannot stand as it was the basis of the appellant's conviction.

On the third ground of appeal, the appellant's moan is that exhibit P1 was not read out after its admission in court. In the case of **Said Salum v The Republic , crim appeal no. 499 of 2016 , CAT at DSM** – Unreported at page 14 provided that:

*"failure to read exhibits after its admission is fatal . It is liable to expunge".*

It was his submission that the proceedings at pages 11 and 12 , exhbit P1 did not comply with the law for it to be relied upon. The appellant was also not accorded a chance to comment on it. In the case of **Isanga Job v Republic , Crim app 319 of 2021** HC Dsm at page 4 . He prayed the exhibit be expunged from the court's records. On the other hand , the respondent conceded to the fact that exhibit P1 was not read in court while it is a mandatory legal requirement, failure to do so it is expunged. It was his submission that in the instant case the proceedings are clear. But each case must be determined on its own. In the case of **Selemani Makumba v R , (2006) TLR**, it was held that the best evidence comes from the victim. On page 10 and 11 of the typed proceedings, PW2 testified everything, but the appellant did not cross examine PW2. He cited the case of **Martime Kisaka v R , Crim Appeal No. 428 of 2016**, CAT at Mbeya at page 8 , the court held that

failure to cross examine the witness on important matters , implies acceptance of the truth of the matter. He prayed that exhibit P1 be expunged but the evidence of PW2 and PW4 are still intact. It was his view that PW1 and PW3's evidence is hearsay. As their evidence were not material, he conceded that it should be expunged.

On ground no. 4 at page 5 of the judgment, the trial court misapprehended the evidence of PW1 and PW3. In the trial court's judgment the magistrate ruled that there was corroboration. It was his humble view that the evidence of PW1 and PW3 was not corroborated as it is hearsay. To cement his submission he cited the case of **Said Salum v Republic** , (supra) at page 5 where the court held; " hearsay evidence cannot be corroborated".

On the fifth ground of appeal it was his complaint that the trial court did not comply with section 210 (3) of the CPA. The trial magistrate just wrote it was complied with but it was not. The respondent, opposed this ground. He submitted that the trial court complied with section 210 (3) of the CPA and it is reflected on page 11 of the typed proceedings. The appellant replying no comment is a suggestion that the law was complied with. He prayed this ground of appeal to be found without merits.

Rejoining to the fifth ground, the appellant stated that section 210 (3) was not complied with, the trial magistrate wrote it as a matter of fashion and it is questionable.

The appellant's sixth grief is that the trial court did not comply with section 127 (2) of the Evidence Act. The law requires the witness to state that he will tell the truth and not lies. Responding to this ground, the appellant stated that promising to tell the truth entails that he will not speak lies. He stated that it was not fully reproduced as per the law , contextually is clear.

Lastly, the appellant's grief is that the trial magistrate twisted the proceedings. What is written at page 3 of paragraph 3 of the judgment is not reflected in the typed proceedings. In the case of Said (supra) at page 15, the Court of Appeal rebuked the tendency or habit of trial magistrates adding their personal feelings in the judgments. He finally, prayed the appeal be allowed as per the grounds of appeal, conviction and sentence be set aside and the appellant be set free.

The respondent replied to this ground and stated that relying on ground number 6, it may mean the same thing, thus it is not necessarily the same is produced as per wording of the legal provision for it to bear

legal compliance as submitted. He finally, prayed that the conviction and sentence be upheld and enhanced.

Rejoining, to ground number 6 and 7, the appellant submitted that section 127 (2) of the Evidence Act ought to have been complied with in full.

Having gone through the court's records and given due consideration to the rival submissions by the trained minds. The ball is now to the court to determine if this appeal has merits.

In the case at hand the appellant raised seven grounds of appeal but I am of the firm view that they can safely boil down to one major ground which is the prosecution side did not prove its case beyond reasonable doubt. In order to prove the offence of unnatural offence the prosecution side has to prove the following; that the appellant had carnal knowledge with the victim against the order of nature and that the victim is below 18 years. In the case at hand the victim told this court that the appellant used to sodomize him by taking his penis and inserting it into his anus. He also testified to know where the appellant lived and where he studied. He told the court that the appellant used to give him money and warned him not to tell anyone. In order to establish the offence of unnatural offence, the prosecution has to prove that the

appellant penetrated his male organ in the anus of the victim and such penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence. See; **Leonard Raymond v Republic**, Criminal Appeal no. 211 of 2016 at page 8. The best evidence in sexual offences is from the victim and no one else. This is per the celebrated case of **Selemani Makumba v Republic** [2003] TLR 203. The law is settled that age may be proved by the victim, her parents or medical practitioner (See **Isaya Renatus vs R**, Criminal Appeal No. 342 of 2015, CAT at Tabora (unreported)). In the case at hand the father of the victim testified in court that the victim was born in the year 2010 and during the commission of the offence he was 9 years old. Gathering from this, it is evident that the victim's age was below 18 years old and that according to the victim the appellant had carnal knowledge of him against the order of nature.

In this case also apart from the victim and the doctor the rest of the witnesses testified on hearsay evidence as they were not present. As well submitted by the advocate for the appellant, hearsay evidence is not admissible in court. The issue now is whether the testimony of the victim was credible and reliable. it is settled law that the trial court's finding on the credibility of a witness is binding of the appellate court. This was held in the case of **BAKIRI SAIDI MAHURU vs THE**

**REPUBLIC,** criminal Appeal no. 107 of 2021 at page 6 that cited the case of **OMARY AHMED v. THE REPUBLIC** (1983) TLR 32 (CAT);

> *"The trial court's findings as to the credibility of the witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which case for a reasement of credibility...".*

Also, in the case of **Goodluck Kyando** vs. **R** (1996) TLR 263, it was held that:

> *"every witness is entitled to credence. Unless there are good and cogent reasons for not believing him, he must be believed and his testimony accepted as held in* ***Alyoce Maridadi vs R,*** *Criminal Appeal No. 208 of 2016, CAT (unreported). The reasons for not believing a witness include: One, contradictions, discrepancies or conflicting statement in the witnesses' evidence; Two, failure by the witness to name the suspect at the earliest opportunity possible; Three, giving implausible or hearsay evidence; Four; giving evidence basing on suspicion."*

Being guided by the above case law, this court will not interfere with the credibility of the victim's testimony as it had the opportunity to see the demeanor of the victim and it found him credible.

This court will now consider, if the trial court complied with section 127(2) of the Evidence Act. Section 127 (2) of the Evidence Act ,

requires the court to direct the victim to promise to tell the truth. In the case at hand at page 14 of the typed proceedings the victim stated "I promise to say the truth ". That was it. In the case of **Seleman Moses Sotel @ White v The Republic** , Criminal No. 385 0f 2018, CAT at Mtwara from page 11 provided ;

> "...*Obviously, the provision is silent on the procedure which a trial court should apply to decide whether a child witness should give evidence on oath or affirmation or upon a promise to tell the truth and on undertaking not to tell lies. Addressing that lacunae, the Court had this to say in the case of Godfrey* ***Wilson*** *(supra). "The question, however, would be on how to reach at that stage. 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 o f the child.*
2. *The religion which the child professes and whether she/he understands the nature o f oath.*
3. *Whether or not the child promises to tell the truth and not to tell lies."*

Guided by the above case it, it is my humble opinion that s.127 (2) of the evidence Act was not fully complied with. On the way forward this

court has no choice but to expunge the evidence of the victim from the court's records. This court is steered by the decision of the Court of Appeal in the case of **Issa Salum Nambaluka v The Republic** , Criminal Appeal No. 272 of 2018 . Where the trial court did not comply with section 127 (2) of the Evidence Act, the victim's evidence was expunged.

Now that the victim's evidence is expunged from the court's record, this court will now determine if there is any evidence to sustain the conviction and sentence levelled on the appellant. According to the trial court's judgment, the court mainly convicted and sentenced the appellant basing on the evidence of the victim and now that it is expunged it has no evidence to sustain the conviction and the sentence of the appellant. Therefore, it is the holding of this court that the prosecution did not prove it case beyond reasonable doubt.

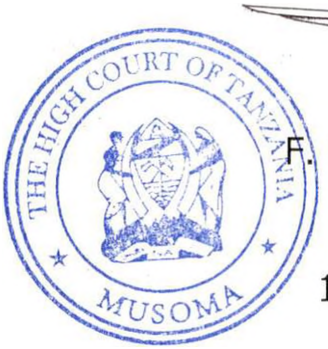
Before I pen off, I find it relevant to discuss the complaint of the appellant that exhibit P1 was not read in court after it was admitted. I have gone through the court's record and on page 11 of the typed proceedings the doctor tender the PF3 and it was admitted and marked exhibit P1. But it was not read in court after its admission. There are a plethora of authorities to this effect. See; **Goodluck Aloyce v R ,**

Criminal Appeal no. 459 of 2019 and **Robinson Mwanjisi & others vs Republic** [ 2003] T.L.R 218. Failure to comply with this requirement of the law results into expunging the document. After expunge the court can consider the oral testimony of the victim. The evidence of the doctor is an expert opinion hence not reliable as that of the victim. Therefore, it is the holding of this court that the prosecution side did not prove its case beyond reasonable doubt.

In fine, this appeal is allowed and the appellant should be released from custody unless held for another lawful cause.

It is so ordered.

DATED at MUSOMA this 15th day of November, 2021.




F. H. Mahimbali

Judge

15/11/2021