IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 50 OF 2020

(Originating from Criminal Case No. 69/2014 at the District Court of Kiteto at Kibaya)

MCHANA MOHAMED.....APPELLANT

VERSUS

THE D.P. P..... RESPONDENT

JUDGMENT

9/9/2021 & 12/11/2021

The appellant, Mchana Mohamed, was convicted and sentenced to life imprisonment at the District Court of Kiteto in Criminal Case No. 69/2014 for committing unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E 2002. Aggrieved, he preferred an appeal to this court challenging the decision of the trial court.

It was alleged that on 22nd day of May, 2014 around 12:30 HRS at Chekanao Village within the District of Kiteto in Manyara region, the appellant had unlawful carnal knowledge of a girl aged three (3) years old

against the order of nature. During the hearing it was revealed that, PW1 found the appellant with the victim inside a closed room. Having opened the door of a room using a knife, he found the appellant and the victim who was unconscious surrounded with faeces and blood. He locked the door and called other people to witness what had happened including PW3 (victim's mother). The appellant having been interrogated about what happened to the victim, he replied that it was just satan who influenced him to do so and begged for forgiveness. They took him and the victim to the village office and eventually to the police station where the victim was issued with a PF3 to go to hospital while the appellant remained under police custody.

In his defence, although at first the appellant denied to have committed the alleged offence, eventually he admitted to have committed the alleged offence. On the basis of the evidence adduced, the trial court found the appellant guilty as charged and sentenced him to twenty years imprisonment. Dissatisfied, the appellant filed the present appeal armed with five (5) grounds of appeal and later lodged five (5) additional grounds of appeal. The ten grounds of appeal are reproduced herein below as follows:

(1) That, the trial Court erred in law and in fact by acting upon the defective charge sheet.

(2) *That, the purported cautioned statement of the accused was taken contrary to the mandatory provisions of the law.*

(3) *That, the trial Court erred in law and in fact for relying on exhibits P1 and P2 contrary to the law.*

(4) *That trial court erred in law and in holding that the evidence tendered by the prosecution witnesses proved the charge laid against the appellant herein beyond reasonable doubt.*

(5) *That the trial court erred in law and in fact by not complying with provisions of section 192 of the CPA, Cap. 20 R.E.2002.*

(6) *That exhibit PE1 (the PF3) improperly and unprocedurally found its way in evidence and should be expunged in the first, it was wrongly tendered by the prosecutor and second, it was not read out after it was admitted.*

(7) *That exhibit PE3 (cautioned statement of the appellant) improperly found its way in evidence and should be expunged as it was not read out in court after it was admitted.*

(8) *That the learned trial magistrate grossly misdirected himself in believing that the appellant committed the charged offence on SABRINA ABDALLAH by basing on the evidence of PW2 despite the fact that PW2 never named and identified the person he examined.*

(9) *That the learned trial magistrate erred in law and in fact in believing that the appellant committed the charged offence without the alleged victim being presented and seen by the Court.*

(10) *That the magistrate failed to comply with section 210(3) of the CPA.*

At the request of parties, hearing proceeded by way of written submissions. The appellant fended for himself without representation while the respondent was represented by Mr. Ahmed Hatibu, State Attorney.

Starting with the first ground, the appellant faulted the trial court for acting upon a defective charge sheet. However, the appellant did not address the Court on this ground in his written submissions. Thus, this Court is not in a position to determine why the appellant considered the charge sheet defective in the absence of any explanation to that effect. Consequently, this Court finds no merit in this ground of appeal.

I will proceed to deal with the second, third, sixth and seventh grounds together as they all deal with procedural impropriety in admissibility of exhibit PE1 (the PF3), PE2 and PE3 (cautioned statement of the appellant). The appellant maintained that exhibit PE1 was wrongly tendered by the prosecutor instead of the witness. Further to that, both exhibit PE1 and PE3 were not read out after being admitted in evidence. As for exhibit PE2, he maintained that it was wrongly relied on by the Court without assigning any reason on why it was wrong to rely on exhibit PE2.

Having perused the records of this matter, it is clear that, exhibit PE1 and PE3 were not read out in court after being admitted as exhibits. Further to this, it is apparent that, while exhibit PE1 (PF3) was tendered in the course of testimony of PW2 who is the Clinical Officer who examined the victim and filled the PF3, the person who offered to tender the

document in Court was the public prosecutor and not the witness. As for exhibit PE2, this was not a document but a gown allegedly worn by the victim on the fateful date to which the requirement of reading out is not applicable.

It is trite law that, once a document is admitted in evidence before the Court it has to be read out. Failure to read out documentary exhibits is fatal as it denies an accused person an opportunity of knowing or understanding the contents of the exhibit (See Robinson **Mwanjisi and Others VS Republic**, 2003 T.L.R 218). Since exhibit PE1 and PE3 were not read out after being admitted this Court expunges the two exhibits from the records of this Court.

Coming to the fifth ground, the question is whether section 192 and 210 (3) were complied with. The appellant alleged that, the Preliminary hearing was not conducted as required by section 192 of the CPA and the evidence of the witness were not read aloud to them after they have been recorded as per section 210 (3) of the CPA.

The appellant alleged that he was not able to state the disputed and undisputed facts due to a non-compliance with section 192 of the CPA. However, records of the trial court reveals that the preliminary

hearing was conducted and the appellant was able to admit his name and personal particular and disputed the rest.

In respect of section 210 (3) of the CPA, the section reads as follow;

"*The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence.*"

Although in the present case the trial magistrate failed to show whether this requirement was complied with, the court has not been addressed whether such omission or irregularity has in fact occasioned a failure of justice to the appellant. I therefore find the alleged omission curable under section 388 of the CPA.

On the fifth ground, the appellant alleged that PW2, the Doctor who examined the victim, did not mention the name of the victim when he was testifying. This Court will not be detained by this point as the Doctor was summoned to give evidence on the child mentioned and described in the charge sheet and, in his testimony, he gave a similar description of the victim as a child of three years old. Further to this, the appellant had a chance to cross examine this witness on that aspect him but he opted not

to question him which implies that he understood the victim that PW2 was talking about. I therefore find no merit on this ground.

Concerning the complaints under the 5th issue, that the victim was never brought before the court. It was the appellant's submission that as long as the victim was never brought before the court, the prosecution failed to prove the occurrence of the offence to the standard required by the law. This court having gone through the records of the trial court, the charge sheet reveal that the victim was of the two years of age when the incident occurred. That means, even if the victim was brought before the court, she could not be able to testify as she was very young at that time that's why Pw1, Pw3 and others testified on her behalf.

The last issue was whether the charge was proved to the standard required by the law. The appellant alleged that due to the narrated shortcomings the prosecution failed to prove their case, therefore he was wrongly convicted and sentenced. On his side, the respondent's counsel submitted that, the evidence adduced at the trial court plus the appellant's admission proved the charge beyond all reasonable doubt. The evidence of PW1 corroborated with the evidence of PW2 and PW3 proved that the appellant sodomized the victim. He made reference to the case of **Hamis**

Mohamed vs Republic, Criminal Appeal No. 297 of 2011, CAT at Arusha (unreported) where the court held that;

> *"a decision not to cross examine a witness at all in a particular point is tantamount an acceptance of unchallenged evidence as accurate, unless the testimony of the witness is incredible ...."*

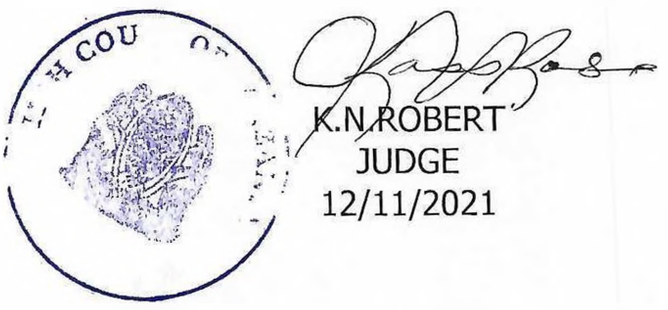
It is trite law that the burden of proof against the accused always lies on the prosecution and no conviction shall be entered on account of weak defence but upon proof of the case beyond reasonable doubt. (See **John Makolebela, Kulwa Makolobela and Eric Juma alias Tanganyika**, [2002] T.L.R. 296). To prove unnatural offence against the appellant under section 154(1)(a) and (2) of the penal Code, the prosecution was required to establish that the appellant had carnal knowledge of a person against the order of nature and further that the offence was committed to a child under the age of ten years.

Proof on whether the appellant had carnal knowledge of the victim was given by PW2 who examined the victim, his evidence which was corroborated by the evidence of PW1 who found him closed in the room with the victim, PW3 who went to the scene and talked to the appellant and the appellant himself who admitted to have committed the alleged

offence against the victim. The witnesses also testified that the victim was about three years old at the time of the alleged incident.

In the circumstances and on the foregoing reasons, this court finds that the prosecution managed to prove their case beyond reasonable doubt. As a consequence, this appeal is hereby dismissed for lack of merit.

It is so ordered.



K.N.ROBERT
JUDGE
12/11/2021