

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

**(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**DC CRIMINAL APPEAL NO. 143 OF 2020**

*(Originating from District Court of Dodoma at Dodoma Criminal Case No. 260 of 2018)*

**DANIEL MAKAMBALA .....APPELLANT**

***VERSUS***

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

*24/5/2022 & 9/6/2022*

**JUDGMENT**

**MASAJU, J**

The Appellant, Daniel Makambala, was tried and convicted of the offence of Unnatural offence contrary to section 154(1) (a) of the Penal Code [Cap 16] in the District Court of Dodoma at Dodoma. He was sentenced to serve life imprisonment. Aggrieved with the trial court's decision, the Appellant has come to the court by way of an appeal.

The Appellant's Petition of Appeal is made up of eight (8) grounds of appeal in which he essentially argues that the prosecution case against him was not proved beyond reasonable doubt.

When the appeal was heard in the court on the 19<sup>th</sup> day of May, 2022 the layman Appellant appeared in person and prayed to adopt his Petition of Appeal to form his submissions. He prayed the court to allow the appeal.

On her part the Respondent Republic was represented by Ms. Neema Taji, the learned State Attorney, who supported the appeal by submitting that, the charge was defective in that the section of law cited in the statement of offence does not provide for punishment. Secondly, that there was no proof of the victim of crime, Seleman Said (PW2) promising on his own to tell the truth pursuant to section 127(2) of Evidence Act [Cap. 6]. Thirdly, there was no proof age of the victim of crime. That, proof of age is very criminal in sentencing the offender. The Respondent prayed the Court to allow the appeal accordingly.

That is what was shared by the parties in support of the appeal in the Court.

The Court appreciates the submissions by the parties in support of the appeal in the Court. Section 127(2) of the Evidence Act [Cap.6] gives a mandatory requirements for the child witness to promise to tell the truth and not to tell any lies in his own words prior to testifying in the Courts. In the instant case, the key witness, victim of crime (PW2) who I allegedly 8 years old testified in the trial Court. The record of proceedings of the trial Court does not reveal the actual statement of the child witness (PW2) promising to tell the truth. What is seen is the statement, thus;

*"PW2, Seleman Saidi 8 years, Resident of Chaduru, pupil of STD III at Ipagala. Unsworn and (promise to speak the truth)"*

This is contrary to section 127(2) of the Evidence Act [Cap 6] and the only remedy thereof is to expunge the whole evidence by PW2 from the record of the prosecution case evidence as it is hereby so done. This brings the prosecution case before the trial court to hang on a too thin thread of evidence to ground sustainable conviction.

The Court is also inclined to appreciate the submissions by the Respondent Republic as regards the defective charge. The Respondent was arraigned in the trial Court for the offence of Unnatural Offence contrary to section 154(1) (a) of the Penal Code [Cap 16] which only establishes the offence. The provision of law establishing the sentence thereto was not cited in the charge sheet. The Respondent Republic ought to have cited section 154 (1) (a) and (2) of the Penal Code [Cap 16].

The appeal is hereby allowed accordingly. The conviction and sentence of life imprisonment, respectively, are hereby quashed and set aside.

The Appellant shall be released from prison forthwith unless otherwise held for another lawful cause.



GEORGE M. MASAJU

**JUDGE**

9/6/2022