IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

(AT DAR ES SALAAM)

CRIMINAL APPEAL NO. 152 OF 2021

(Originating from Criminal Case No.408 of 2018 Ilala District Court)

BAKARI YUSUFU.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 22/11/2021
Date of Judgement: 05/8/2022

LALTAIKA, J.

The appellant in this case is aggrieved by the decision of the District Court of Ilala which convicted him for unnatural offence contrary to section 154(1)(a) of the Penal Code Cap 16 RE 2002 and sentenced him to 30 years imprisonment and to pay five hundred thousand Tanzania Shillings (500,000) as compensation to the victim. Aggrieved by the decision of the trial court, the appellant has preferred the following grounds:

1. *That, the learned trial magistrate grossly erred in law and facts to convict the appellant relying on evidence of a child of tender age*

(PW1) whose evidence was received contrary to section 127(2) of the evidence Act as amended by miscellaneous Amendment Act No.4 of 2016.

2. *That, the learned trial magistrate erred in laws and facts for not considering and/or discussing the evidence of ALIBI which was raised by the Appellant in the course of his defence.*
3. *That, the learned trial Magistrate erred in law and facts to convict the appellant basing on evidence PW2 and PW3 which are contradictory as to what was revealed in the Anus of the victim following physical examination which was done by them immediately after the incident.*
4. *That, the learned trial Magistrate erred in law and fact by convicting the Appellant basing on invalid PF.3 (Exh.P1) which was not identified by PW2 nor read out after being admitted in evidence.*
5. *That, the learned trial Magistrate erred in law for not explaining the substance of the charge to the appellant and/or inform him of his rights to defence after the close of the Prosecution case and deny him right to fair hearing.*

Arguing on his grounds of appeal, the appellant submitted that the evidence of PW1, a child of a tender age, was obtained in contravention of section 127(2) of the Evidence Act as amended by Act No.4 of 2016. The appellant invited this court to the decision of the case of **Godfrey Wilson vs. Republic**, Criminal Appeal No.168 of 2018 (unreported) where the court held that, where a witness is a child of tender age, a trial court should at the foremost aske few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he /she can proceed to give evidence on oath or affirmation depending on the respective religion professed by the child witness and if the child does not understand the nature of oath the child witness should, before testifying be required to promise to tell the truth and not to tell lies.

It is the appellant's submission further that nowhere in the court records did PW1 promise not to tell lies as required by section 127(2) of the evidence Act. Therefore, the appellant asserts, the omission was not in line with demands of the section under discussion. The appellant prays to this court to expunge PW1's evidence from the record. The appellant asserted further that once such evidence has been expunged the rest of the evidence adduced from other prosecution witnesses become too weak

to sustain conviction since both PW2's and PW3's evidence was very weak and lacked evidential value.

On the other second ground of appeal related to the defence of ALIBI; the appellant submitted that the trial court did not consider the his defence of ALIBI. It is the appellant's submission that the trial court did not discuss the ground and that such failure was a serious misdirection on the part of the trial court. With those few additions, the appellant prayed that his detailed written submission be considered a part and parcel of his grounds of appeal.

In reply the Respondent's counsel Ms. Christine Joas, learned Senior State Attorney stated that she was not in support of the appeal.

On the first ground that, the learned Senior State Attorney was in agreement that indeed section 127(2) of The Evidence Act demands that a child of tender age promises to tell the truth to the court and not to tell lies. However, Ms. Joas was quick to state that such a legal requirement was complied with as it appeared at page 12 of the trial court's proceedings. To that end, counsel for the respondent refuted the appellant's assertion and the recommendation for expunging the victim's evidence on the ground raised.

On the third ground of appeal Ms. Joas submitted that the physical examination [of the victim] was not meant to expose who sodomised the her but rather to corroborate the victim's testimony of having been sodomised. The learned Senior State Attorney submitted further that the same did indeed corroborate the victim's testimony and confirmed the offence. Ms. Joas added that the key ingredients that needed proof on the side of the prosecution was penetration. To support her submission the learned Senior State Attorney cited the case of **Menald Wenela v. Dpp** (Criminal Appeal No.336 of 2018) TZCA, 520 and **Selemani Makuba V.Republic [2006]; Joel Ngailo v.Republic** ,Criminal Appeal No.344 of 2017 CAT(unreported).

On the issue that the PF3 was not read out after it was submitted, the respondent strongly disputed this by reverting to page 20 of the proceedings. The respondent submitted that following sub-heading" PW2 continued: "it is recorded that "Explaining on the PF3…" .To the respondent that assertion means the PF3 was explained and read out after its admission.

Submitting on the issue that expert witness is just an opinion and cannot alone prove the ingredients of the offence, the respondent make a correction to what the appellant submitted by stating that such evidence

was not meant to stand alone in proving the offence but as a corroboration on the victim's allegation of being sodomised and to prove the key ingredients of such offence which was penetration. That is the key purpose of such evidence as it was upheld in the case of **Menald Wenela V.Dpp, (Criminal Appeal No.336 of 2018) TZCA,520.**

On the second ground that the trial magistrate erred in laws and facts for not considering or discussing the evidence of ALIBI which was raised by the appellant in his defence. Counsel for the respondent submitted that as per section 194(4) of the Criminal Procedure Act, Cap 20 R.E 2019, it is mandatory for an accused person who intends to rely on Alibi as his defence to furnish a notice of his intention to the court and prosecution before hearing of the case or any time before the case for prosecution is closed. In this case the appellant raised the defence of ALIBI during his defence but the same was unprocedural and did not merit consideration. To buttress her argument Ms. Joas cited the case of **Jumanne Juma Bosco and Mohamed Jumanne v. Republic,** Criminal Appeal No.206/2012 CAT (unreported**), Kibale v.U,** (1969) VOL.IE.A 148

On the 5th ground, the learned Senior State Attorney submitted that a quick perusal at page 29 of the proceedings revealed that there was a court ruling to the effect that the prosecution had made its case

sufficiently enough to require the accused person to give his defence. It is Ms. Joas' submission further that the court ruling itself was sufficient notice to the defence side to start its case in defence against the allegations. Ms. Joas added further that in the same page, there was an entry in the proceedings indicating that the appellant's advocate stated that he would call five witness and the same was done.

The learned Senior State Attorney concluded her submission by a prayer that the appeal be dismissed

I have carefully gone through the records and submissions by both parties on the issues pertaining to the appeal. I must say on the very outset that this appeal has given me an opportunity to reflect, not on the grounds of appeal argued for and against but rather the concept of fair trial.

When the appeal was called for hearing I immediately discovered that the appellant is hearing impaired. It transpired that the family had secured an advocate to defend the appellant at the trial court but run out of resources for legal services at the appellate level.

I adjourned the matter and communicated the concern through my assistants to the office of the Deputy Registrar only to be told that a

hearing-impaired person could be allowed to argue his appeal by way of written submissions. The appellant hesitatingly accepted the option.

In the hindsight and having considered the rival submissions, I am fortified that the appellant's right to effectively argue his appeal was protected and this touches upon the principle of fair trial. It cannot be overemphasized that; rules of natural justice are an important ingredient of fair trial in our jurisdiction. In the case of **Mbeya-Rukwa Auto Parts and Transport v. Jestina George Mwakyoma** (2003) T.L.R. 251 the court had the following to say about natural justice:

> *"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard among the attributes the equality before the law."*

I have given some considerable reflection on the appeal in the right of fair trial principles especially as they apply to people with disability (PWs). It appears to me that the appellant has fought his appeal to the best of his ability. Although deciding the appeal on merit still raises doubts on proof of the prosecution case beyond reasonable doubt as required by law, deciding the appeal purely on merit would be tantamount to turning

a blind eye on the predicaments of PWD's. Besides, it is a cherished principle in our criminal justice that conviction must be based on the strength of the prosecution's case and not the weakness of the defence.

In the upshot, I allow the appeal, quash the conviction and set aside the sentence of 30 years imprisonment and the order of compensation to the tune of Tanzanian Shillings (500,000) as compensation to the victim. The appellant is to be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

E.I. LALTAIKA

JUDGE

5/8/2022