IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 48 OF 2022

(Originating from Criminal Case No. 172 of 2020 of the Resident Magistrate's Court of Arusha)

GIFT JOSHUA OTUORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

14th July, 2022 & 29th August, 2022

MWASEBA, J.

Before the Resident Magistrate's Court of Arusha, the appellant was charged with four separate counts of unnatural offences contrary to Section 154 (1) (a) and (2) of the Penal Code, Cap 16 R.E 2019 (Now R.E 2022). After full trial, he was convicted on all four counts as charged and sentenced to life imprisonment for the 1st and 2nd counts and 30 years imprisonment for the 3rd and 4th counts. The custodial sentences were ordered to run concurrently.

In a nutshell, the facts of the case which led to the conviction of the appellant are briefly stated as follows: The appellant and the two victims

are relatives whereby the appellant and child **JJ** are agnate siblings who share the same father while **BF** is the appellant's nephew (the victim's names are withheld). It was alleged that, way back in 2014 the victims were sent to the appellant's home at Mbauda area in Arusha by the appellant's father to give him a coach. By then **JJ** and **BF** were 8 and 10 years old respectively. Upon reaching there, the appellant asked them to get in his house and started sodomizing **BF,** thereafter he did the same to **JJ**. He threatened them not to tell anyone and that if they would disclose the episode to anyone they would know who he is. The two victims managed to keep the secret up to 18th May 2020 when **JJ** was caught in the process likely to lead him to sodomize his grandmother's neighbour's children. He was taken to the police station where he mentioned **BF** and another child namely **CO** (name not disclosed) whom he 'used to practise bad game with.' After being released from the police station and arriving at home **JJ's** aunt had more interrogation with him. He mentioned the appellant and Elisha Odoi to have been sodomizing them as well. The two victims were taken to hospital for examination and the doctor diagnosed that both of them had loose anal sphincter. The certified copies of the PF3 were admitted in court as exhibit as the original copies were used in another case file of Elisha Odoyo.

On his side, the appellant denied all the allegations and before hearing of the prosecution case he gave a notice of alibi. And on defence hearing he alleged that in the year 2013 up to 2014 when the offence is alleged to have been committed, he was in Dar es Salaam for studies. He brought in court his school certificates to prove his allegation.

The trial court found the prosecution had proved the case to the required standard, convicted the appellant and sentenced him accordingly. Aggrieved by the said decision, the appellant has come before this court to challenge it having nine grounds of appeal. In the first ground he is challenging that the trial court did not comply with **Section 127 (2) of the Evidence Act** when recording the evidence of PW1 (**JJ**). In the second ground he is challenging the charge sheet to be defective. The third and eighth grounds are being challenged for the prosecution evidence being unreliable and thus the case was not proved beyond all reasonable doubt. In the fourth, fifth and seventh grounds of appeal he is challenging the noncompliance of **Section 240 (3) of CPA** and **Section 67 and 85 of the TEA** in the admission of PF3. The sixth and ninth grounds are challenged for the trial court not considering the defence evidence and shifting the burden of proving the defence of alibi to the appellant.

During the hearing of this appeal the appellant was represented by Mr Yoyo Asubuhi Learned Counsel while Ms Eunice Makala appeared for the respondent. The appeal was disposed of by way of written submission.

Submitting in support of the 1st ground, Mr Yoyo Asubuhi pointed out that the evidence of PW1 was taken without ascertaining whether the child in question did know the nature of oath before prompting him to promise to tell the truth. He says skipping that preliminary stage was a fatal error. To cement his point, he cited the case of **Godfrey Wilson Vs Republic**, Criminal Appeal No. 168 of 2018 in which the Court of Appeal sitting at Bukoba stated that the trial court has to ask the witness of tender age such simplified questions before he makes a promise to tell the truth.

Regarding the 2nd ground Mr Yoyo submitted that the chargesheet from which the appellant was convicted was tainted with some fatal defects, rendering the same nugatory and incompetent to ground conviction. He clarified that in the first and 3rd counts the specific dates when the offence was committed are missing. And in the 2nd and 4th counts the dates, months and year when the offence was committed are missing something that denied the appellant a fair chance to prepare his defences. To buttress his point, he cited the case of **Richard Maginga**

Vs Republic, Criminal Appeal No. 133 of 2016, from the Court of Appeal sitting at Tanga.

Submitting on the 3rd ground of appeal he averred that the trial magistrate convicted the appellant basing on unreliable evidence given by incredible witnesses. He further demonstrated that the victims herein failed to mention the appellant at the earliest opportunity possible something that render their testimony so suspicious and questionable. That the two victims never ever named the appellant for six good years from 2014 to 2020 when he was caught and taken to police station and mentioned the 2nd victim. Later after being beaten by Kabonda he mentioned the appellant. To support his point, he referred this court to the case of **Godfrey Gabinus Ndimba and Two others Vs Republic**, Criminal Appeal No 273 of 2017, Court of Appeal sitting at Mtwara. He further stated that apart from failure to mention the appellant at the earlier stage, the evidence of PW1 and PW3 are tainted with contradictions with regard to the place PW3 was residing as to whether at Majengo with his parents or at his grandfather.

In his 4th ground of appeal, he challenged the admission of the PF3 to be contrary to **Section 240 (3) of Criminal Procedure Act** which imposes a legal duty to a court to inform the accused Person of his right

to require a person who made a report to be summoned for cross examination. To support his point, he referred this court to the case of **Hamisi Saidi Butwe Vs Republic**, Criminal Appeal No. 489 of 2007 Court of Appeal sitting at Mtwara.

In the 5th and 7th grounds of appeal, he submitted that the PF3 was admitted contrary to **Section 67 and 88 of the Evidence Act**. He emphasized that it is well settled as to what instances can secondary evidence be admitted in evidence. And who is competent to certify it.

Submitting on the 6th ground of appeal he averred that the trial court shifted the burden of proving the defence of alibi to the accused while the accused complied with **Section 194(4) of the Criminal Procedure Act**.

In his 8th ground of appeal, he insisted that the prosecution case was not proved beyond all reasonable doubt. He pointed out on what he submitted on defective chargesheet, violation of **Section 127 (2) of the Evidence Act** and having contradictory evidence. He further pointed out that the victims failed to name the appellant at the earliest time possible and that the doctor gave hearsay evidence as he was not the one who examined the victims.

In his 9th ground of appeal, the learned counsel averred that the trial magistrate did not consider the defence evidence which established a serious doubt as to alleged commission of offence. He referred to the defence of alibi and the evidence of DW3 and DW4 which, he says, were of higher evidential value as it raised a yawning doubt to the prosecution case.

Submitting in reply to the submission in chief, Ms Makala learned State Attorney submitted that after going through the record they support conviction and sentence imposed to the accused by a trial court. She submitted on the first ground that the record is very clear that the trial magistrate complied with **Section 127 (2) of the Evidence Act** when recording the evidence of PW1 as a child witness duly promised to tell the truth.

She further submitted on the 2nd ground of appeal with regard to the chargesheet that non-disclosure of the date in the chargesheet is not fatal and absence of the said dates as to the occurrence of the incident did not materially impeach the strong victim's account as to when they were sodomized by the appellant and the appellant did not cross examined the prosecution witnesses whose account incriminated the appellant as charged. She backed up her submission with the case of

Pascal Aplonai Versus Republic, Criminal Appeal No. 403 of 2016 (Unreported) CAT at Tabora.

In regard to the 3rd ground of appeal she submitted that failure of the victims to name the appellant at the earliest opportunity was due to the threat that the appellant gave them so that they do not disclose the incident to anyone. Regarding the contradictions in the prosecution case, she averred that contradiction on the place of residence and time of commission of offence does not go to the root of the case as the incident took place way back in 2014 hence the said error was due to lapse of time. She referred this court to the case of **Emmanuel Lyabonga Vs Republic,** Criminal Appeal No. 257 of 2017 (Unreported) CAT at Iringa.

Submitting on the 4th ground of appeal she averred that the PF3 was admitted in compliance of **Section 240 (3) of the Criminal Procedure Act**. She said that the doctor was summoned to testify, and the appellant was given a chance to cross examine him. The fact that he was not a maker she argued that the doctor possesses knowledge on what was filled by his fellow doctor. She cited the case of **DPP Vs. Mirzai Pirbakhish and 3 others**, Criminal Case No. 493 of 2016 (Unreported) CAT Dar es Salaam.

She went on submitting on the 5th ground as to the contravention of **Section 67 and 88 of Evidence Act** and contended that the same were properly admitted by the court which after hearing both sides ruled out that the PF3 are admitted as certified copies.

She skipped the 6th and 7th ground and submitted on 8th ground by insisting that the case was proved beyond all reasonable doubt because to prove the offence of unnatural offence the main ingredient is penetration as it was stated in the case of **Joel S/O Ngailo Vs Republic**, Criminal Appeal No. 344, (Unreported) CAT at Iringa.

Lastly, the Learned State Attorney submitted on the 9th ground that the appellant defence that he was absent when the offence was committed is an afterthought as he did not cross examine the witnesses on the alleged absence and on the issue of family conflicts.

After having the rival submissions from both parties and going through the record I am now in a position to determine this matter. In determining this appeal, I will discuss the grounds of appeal jointly as they all fall under the same subject matter as to whether the case against the appellant was proved beyond all reasonable doubt.

Concerning the first ground of appeal which referred to noncompliance of **Section 127 (2) of TEA**, I have revisited the record. Before PW1 testifying, the trial magistrate concluded that the child has promised to tell the truth. However, the counsel for the accused is challenging that the court did not follow the procedure laid down in the case of **Godfrey Wilson Vs Republic** (Supra). In my considered view, failure to question a child of tender years prior to giving his evidence is not fatal. There is a current decision of the Court of Appeal sitting at Mwanza in the case of **Wambura Kiginga Vs. The Republic**, Criminal Appeal No. 301 of 2018 in which the Court of Appeal demonstrated that although the child did not promise to tell the truth, what she narrated was original, true and authentic. There after they proceeded to the evidence of the witnesses as I do.

It is a settled principle that the best evidence in sexual offences comes from the victim. This position is well stipulated in the case of **Mohamed Said Vs Republic,** Criminal Appeal No. 145 of 2017, Court of Appeal sitting at Iringa where the Court held, *inter alia,* at page 14 that: -

> *"We are aware that in our jurisdiction it is settled that the best evidence of sexual offences comes from the victim. We are also aware that under section 127 (7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for sexual offence may*

be grounded solely on the uncorroborated evidence of the victim. ***However, we wish to emphasize the need to subject the evidence of such victims to scrutiny in order for the courts to be satisfied that what they state contain nothing but the truth." (Emphasis is mine)***

In the case at hand, the conviction of the appellant was merely founded from the evidence of two victims who are PW1 and PW3. They both told the court that they were sodomized in 2014 by the appellant after being sent by their father/grandfather (DW3) to take a coach to the appellant's home. This fact has been disputed by DW3 who testified on the defence side that he never sent them to take a coach to the appellant.

Also, when PW1 was taken to the police station and interrogated as to who had been 'doing bad acts' to him, he mentioned his fellow two children that is **BF** (PW3) and **C**. And later after being released, her aunt had time to interrogate him more as to who did bad game to him. PW1 mentioned Gift (Appellant) and Elisha Odoi. On the part of the PW3 he said that they were spanked badly by Mr Kabonda so that they name a person who sodomised them they mentioned Gift who is the appellant herein. Both victims say they did not mention the appellant at early

stage due to the threat they were given. In my considered view this evidence is still wanting to meet the standard of proving the case beyond all reasonable doubt. This is due to the fact that the victims are not certain as to who sodomised them.

I am aware that threat to children can lower their confidence to report any abuse committed to them. This is due to the fact that most of children lack awareness of their legal rights and sometimes they do not know who to turn to in case they need help and how to access justice when their rights are violated. However, scrutinizing the evidence in this matter, I am inclined to concur with the learned counsel for the appellant that the two victims managed to keep secret for all six good years from 2014 to 2020 and that when they were asked as to who did bad game to them, PW1 mentioned his fellow children. The appellant was mentioned later and that he sodomised them in 2014.

The allegations were strongly disputed by the appellant by raising a defence of alibi which he gave notice before hearing the prosecution case. The appellant alleged to be in Dar es salaam in the said year since 2013 to 2014. His school certificate and internship certificate were admitted in court as exhibit. His supervisor during internship was among his witnesses to prove the absence of the appellant in Arusha as he was

attending internship in Dar es salaam in 2014. Their evidence was supported by Mr Joshua Utuoro (DW3) who is the appellant's and first victim's father that the appellant was in Dar es Salaam for studies. The second victim's mother who is the appellant's sister also denied in court that his son was sodomized. Unfortunately, despite of being duly notified with the notice of alibi, the prosecution did not have any evidence to disprove the defence of alibi by proving the availability of the appellant in Arusha in the year 2014. In the case of **Hamisi Ally Tupatupa Vs. Republic**, Criminal Appeal No. 144 of 2005, High Court Mtwara held that:

> *"The accused bears no burden to prove the alibi rather it is the responsibility of the prosecution to disprove it."*

Thus, due to uncertainty as to who exactly sodomised the victims and failure of the prosecution to disprove the defence of alibi, I am confident to hold that the prosecution case has not been proved beyond all reasonable doubt.

In the upshot, the appeal has merit. I, therefore, quash and set aside the conviction and sentence meted by the trial court. The appellant should be released from custody unless otherwise lawfully held.

It is so ordered.

DATED at **ARUSHA** this 29th Day of August, 2022.

N.R. MWASEBA

JUDGE

29.08.2022

Judgment delivered on 29th day of August, 2022 in the presence of Mr Moffat Sett learned counsel for the appellant and Ms Eunice Makala learned State Attorney for the respondent.

N.R. MWASEBA

JUDGE

29.08.2022

Right of Appeal is Explained.

HIGH COURT OF TANZANIA

N.R. MWASEBA

JUDGE

29.08.2022