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

**IN THE SUB- REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 75 OF 2022**

**LUKUMAN s/o SAID ALLY ..... APPELLANT**

***VERSUS***

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

**(Appeal from the decision of the District Court of Temeke at Temeke in Criminal Case No. 238 of 2020)**

**JUDGMENT**

29th and 31st August, 2022

**KISANYA, J.:**

Lukuman Said Ally, the appellant herein, was charged with unnatural offence, contrary to 154 (1) (a) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2022). It was alleged that on unknown date in June, 2020 at Yombo Njiapanda ya Mwinyi within Temeke District in Dar es Salaam Region, the appellant, did have carnal knowledge against the order of nature to one, JF (name withheld to conceal his identity), a boy aged nine years.

As the appellant denied the charge, the prosecution paraded five witnesses to establish its case. The prosecution account was to the effect that, JF who testified as PW2 was a pupil of Kigunga Primary School. He was living with his mother (PW1) who rented a room in the house of Mzee Mkwavile. The appellant

was also among the tenants in the same house. According to JF, the appellant used to cook rice in his room and invite him and other children. It was his further testimony that the appellant used to take him to his room where he (the appellant) covered his (JF) mouth, undressed and sodomized him. Despite feeling the pain, JF was afraid to inform his parents on the account that they were not friendly to him.

It was on 16th July, 2020, when his teacher one, Edith Lubagubya (PW4) noticed the unusual sitting posture of JF (the victim). At first, JF did not tell his teacher (PW4) what was wrong with him. Later on, JF decided to tell PW4 the cause of his unusual sitting posture. That is when he told her that he was sodomized by uncle Lukuman (the appellant). In view of that information, PW4 reported the matter to the police, whereby WP 3515 D/C Catherine (PW5) was assigned to investigate the same. At the same time, JF was taken to Temeke Hospital. He was attended by Dr. Leah whose medical examination report - PF3 (Exhibit P1) was tendered by Emmanuel Shija (PW3). In terms of the said report, the victim's anus was found loose due to penetration of a blunt object.

In his defence, the appellant admitted that he was a tenant in the house where the victim's mother rented. However, the appellant denied to have committed the offence. He told the trial court that he was implicated in this case

because the victim's mother owed him a sum of Tshs 70,000 which she had failed to pay despite several reminders.

At the conclusion of the trial, the trial court was satisfied that the appellant was guilty of the offence laid against him. The learned trial magistrate went on convicting him of unnatural offence, contrary to section 154(1)(a) of the Penal Code (supra). He was then sentenced to life imprisonment.

The conviction and sentence aggrieved the appellant. He instituted the instant appeal on seven grounds of appeal. In the course of submitting in support of the appeal, the appellant combined them and raised the following six issues:-

1. That, the charge sheet leveled against the appellant was defective as the statement of offence was different from the particulars.
2. That the evidence of PW2 (victim) was recorded in contravention of section 127(2) of the Evidence Act [Cap. 6, R.E. 2022).
3. That there was nothing to prove that PW2 was a school boy of standard IV at Kigunga Primary School.
4. That, PW1, PW2, PW3 and PW4, were incredible and unreliable witnesses to be relied upon.
5. That, defence evidence was improperly disregarded by the trial court while the same raised reasonable doubt on the prosecution case.
6. The prosecution case was not proved beyond reasonable doubt.

Following a prayer made by the appellant, this appeal was disposed of by way written submissions filed by the appellant and Ms. Elizabeth Mkunde, learned State Attorney for the respondent.

Having considered the submissions for and against the appeal, I will proceed to determine the merits of this appeal. In so doing, the argument for and against each ground of appeal will be taken into account.

The first ground of appeal give rise to the issue whether the appellant was charged based on the defective charge. It was the appellant's contention that the charge is defective because its statement of offence did not confirm whether the sentencing section was section 151 (1) (a) of the Penal Code. Further to this, the appellant argued that, the victim's age was not proved. Citing the case of **Andrea Francis vs R**, Criminal Appeal No. 173 of 2014 (unreported), the appellant argued that failure to prove the age of the victim of sexual offence is fatal and incurable omission and it rendered the prosecution case not proved.

Countering this ground, Ms. Mkunde conceded that the sentencing provision was not cited in the charge sheet. However, she submitted that the omission did not prejudice the appellant and thus, curable under section 388 of the Criminal Procedure Act, R.E. 2022. To cement her argument the learned State Attorney cited the cases of **Abdul Mohamed Namwanga @ Madodo vs R**, Criminal

Appeal No. 257 of 2020 and **Jamaly Ally @ Salum vs R**, Criminal Appeal No. 52 of 2017 (both unreported).

Rejoining, the appellant reiterated his submission that the victim's age was not proved. He was of the view that such anomaly is fatal and that the conviction and sentence cannot stand. To support his submission, the appellant cited the case of **Andrea Francis vs R**, Criminal Appeal No. 173 of 2014 (unreported).

To start with, it is settled practice in this jurisdiction that apart from citing the provision creating the offence, the sentencing or punishment provision should also be indicated in the statement of offence of the charge sheet or information. However, the law is now settled law that an irregularity pertaining to non-citation and wrong citation of sentencing provision is curable under section 388 of the Penal Code. This stance was stated in **Abdul Mohamed Namwanga** (supra) and **Jamaly Ally @ Salum** (supra) referred to this Court by the learned State Attorney. For instance, in the former case of **Abdul Mohamed Namwanga** (supra), the Court of Appeal had this to say on the issue under consideration: -

> *"It is only a matter of practice that the punishment is cited in the charge or information along with the provision creating the charged offence. It is a practice that we endorse but we hesitate to equate it with an imperious legal prerequisite that would render a charge or information incurably defective."*

In the present case, the victim's age was stated in the particulars of the statement of the offence as nine 9 years. Since the victim was under the age of eighteen years, the sentence provided for under section 154 (2) of the Penal Code is life imprisonment. It is common ground that section 154(2) of the Penal Code was not stated in the statement of the offence. However, I agree with the learned State Attorney that the said anomaly did not prejudice the appellant. This is when it is considered that the appellant was duly notified of the victim's age.

It was the appellant's further contention that the victim's age was not proved. The respondent did not reply on the appellant's contention. In terms of the settled law, the victim's age may be proved by a birth certificate, or evidence of the victim himself or herself or his or her parent. [See the case of **Isaya Renatus vs R**, Criminal Appeal No. 542 of 2015 (unreported). It is in evidence that, during the inquiry the victim informed the Court that he was 10 years old. Basing on the said inquiry, the trial court was inclined to satisfy itself on whether the victim understood the nature of oath. It went on recording the evidence upon the victim promising to tell the truth. Further to this, it is deduced from the victim's teacher (PW4), that the victim was in standard three pupil at Kigunga Primary School. Therefore, considering the evidence as a whole, I am of the considered view that the victim was under 18 years. On the foresaid account, the first ground of appeal lacks merits.

Next for consideration is the third ground of appeal that the victim's evidence was recorded in contravention of section 127 of the Evidence Act. The trial court is faulted for conducting *voir dire* examination instead of satisfy itself on whether or not the witness understood the nature of oath. It was his further argument that the evidence of PW2 is a nullity. He therefore urged me to discount the evidence of PW2 from the record. The appellant was of the firm view that after discounting PW2's evidence, there remain no evidence to prove the case laid against him.

Responding, the learned State Attorney referred the Court to page 14 and 15 of the proceedings. She went on to submit that the trial court complied with section 127(2) of the Evidence Act before recording PW2's testimony. It was her further argument that PW2's testimony was original, consistent and the said witness told the truth. Therefore, the learned Senior State Attorney urged me to consider that the case of **Wambura Kiginga vs R**, Criminal Appeal No. 301 of 2019 (unreported) where it was held that the court can rely on such evidence even if section 127(2) of the Evidence Act was not complied with.

In his rejoinder, he reiterated his submission in chief that PW2's evidence contravened section 127 (2) of the Evidence Act. He was therefore of the considered view that the victim's evidence lacks evidential value and deserves to be expunged from the record. Citing the case of **John Mkorogongo James vs**

**R**, Criminal Appeal No. 498, the appellant reiterated that after expunging the victim's evidence, there remains no evidence to prove the case

I am alive of the settled position that, in terms of section 127(2) of the Evidence Act, a child of tender age may testify without taking an oath provided that such witness (child) promise to tell the truth and not lies. In the case of **Godfrey Wilson vs. R**, Criminal Appeal No. 168 of 2018 (unreported), the Court of Appeal issued some guidelines on the procedure of recording the evidence of a child of tender age. It was underscored: -

> "*The question however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows:*
>
> 1. *The age of the child.*
> 2. *The religion which the child professes and whether he/she understands the nature of oath.*
> 3. *Whether or not the child promises to tell the truth and not lies.*
>
> *Thereafter, upon making the promise, such promise must be recorded before the evidence is taken".*

The above guidelines were adopted or restated in the cases of **Selemani Bakari Makota @ Mpale vs. R**., Criminal Appeal No. 9 269 of 2018 and;

**Medson Manga vs Republic**, Criminal Appeal No. 259 of 2019 (both unreported).

Having gone through the proceedings, I am of the considered view that the trial court did not conduct a *voir dire* examination. According to the record, the learned trial magistrate complied with the guidelines stated in the case of **Godfrey Wilson** (supra). This is so because the victim (PW2) was probed by the trial court to state among others, his age, the religion which he professes and whether he knew the meaning of speaking the truth. The victim's reply to last issue was as follows:

> *"I know the difference between speaking the truth and lying. The one who is lying is a friend of Satan.* ***I promise to speak the truth nothing but the truth****.* (Emphasize supplied)

Now, although the trial court made a finding that PW2 understood the meaning of speaking the truth, it proceeded to record his evidence without taking an oath. However, much as PW2 promised to "speak the truth nothing but the truth", I am of the view that his evidence was recorded in accordance with section 127(2) of the Evidence Act. On that note, I agree with Ms. Mkunde that this ground lacks merit as well.

Next for consideration is the appellant's complaint that the prosecution did not prove that PW2 was a school boy. This complaint was raised in the sixth ground

of appeal. According to the appellant, the prosecution ought to have proved that fact by tendering the attendance register. Although the learned State Attorney did not respond to this ground, I am of the view that it is not meritorious due to the following reasons. *One,* pursuant to section 154 of the Penal Code, the issue whether the victim is a school boy is not any of the ingredients of unnatural offence. *Two,* in their respective oral testimonies, PW2, PW4 and PW5 testified that the victim was studying at Kigunga Primary School. And as indicated earlier, PW4 is one of the victim's teacher. It is on record that PW2, PW4 and PW5 were not questioned on the fact that the victim was a pupil. As if that was not enough, the appellant did not adduce evidence to disapprove evidence given by the said witnesses on the said fact. That being the case, I have no option than to dismiss this ground for want of merit.

The remaining grounds were tackled generally by the appellant. He submitted that the trial court failed to analyze evidence adduced before it. His submission was premised on the following grounds: *First,* that PW1, PW2, PW3 and PW4 were incredible and unreliable witnesses. *Second,* PW3 did not prove penetration to the victim's anus thereby casting doubt on the prosecution case, whereby he referred the Court to the case of **Seleman Yahaya @ Zinga vs R**, Criminal Appeal No. 533 of 2019 (unreported). *Three,* it was not proved that Dr. Luiza who examined the victim was dead. In the view thereof, the appellant was

of the view that the prosecution case was not proved beyond all reasonable doubts.

It is my considered view that the above stated grounds in support of the fourth issue can be determined by considering whether the prosecution proved its case beyond all reasonable doubt. It is an established principle in this country that in sexual related cases, the best evidence is that of the victim [See the case of **Selemani Makumba v. R,** [2006] TLR 379]. That notwithstanding, the court is inclined to consider other issues including credibility and reliability of witnesses called by the prosecution. This position was stated in case of **Majaliwa Ihemo vs R**, Criminal Appeal No. 197 of 2020 (unreported).

Considering that the appellant was charged with unnatural offence, the prosecution was bound to prove penetration into the victim's anus, his (victim) age and that the appellant at hand was responsible for the said act.

In the instant case, PW2 deposed to have been sodomized by the appellant. He also elaborated how the appellant's penis penetrated in his anus. His evidence was supported by Exhibit P1 in which the doctor who examined the victim formed the view that the victim's anus was loose due to penetration of a blunt object.

As hinted earlier, the appellant contends that PW1, PW2, PW3 and PW4 are not credible witnesses. It is settled law as emphasized in **Goodluck Kyando v.**

**R**, [2006] TLR 363 is to the effect, that every witness is entitled to credence. Therefore, his evidence must be believed and accepted unless there are good and cogent reasons to the contrary. The said cogent reasons may be established by considering whether the witness gave improbable or implausible evidence or contradictory evidence or hearsay evidence

In our case, the appellant did not state how PW1 and PW4 were not credible witnesses. As regards, PW2 contended in the fourth ground of appeal that the said witness did not report the matter immediately after commission of the offence and that, he failed to state to specific date of its commission. As rightly submitted by the learned State Attorney, PW2 testified that he feared to tell his mother about the matter on the account that the latter would have beaten him severally.

Further to this, the appellant challenged PW2's credibility on the account that he failed to state the exact date of commission of the offence. I agree with Ms. Mkunde that, PW2 being a child of 10 years could not remember the exact date. This is also when it is considered that the said witness testified six months after commission of the offence. The said stance was taken in the case of **Hassan Kamunyu vs R, Criminal Appeal No**. 277 of 2016 (unreported) in which the Court of Appeal held:-

> *"PW4 was aged ten at the time he testified. Given his age, lapse of time between commission of the offence and the time of*

*testifying, it is not expected that he would be accurate in every detail. This is allowable at law."*

Being guided by the above position, I hold the view that the fact that PW2 did not state the exact date of commission of the offence by itself is not sufficient to find PW2 not reliable.

As far as evidence of PW3 is concerned, the appellant challenges the same on the reason that the prosecution did not prove that Dr. Luiza who attended the victim was deceased. I have considered that, PW3 testified to have worked with Dr. Luiza at Temeke Hospital. He also testified that the said Dr. Luiza and went on to tender the medical examination report- PF3 (Exhibit P1). It is my considered view that PW3's oral testimony was sufficient to prove that fact. The appellant did not produced evidence to discredit PW3's evidence on the issue whether Dr. Luiza was still alive.

Furthermore, it is on record that, PW3's role was to tender the medical report- PF3 which aimed at supporting PW2's evidence. Therefore, even if PW3 and Exhibit P1 are not considered, the victim's evidence is sufficient to find that the appellant is guilty of the offence. This is because in a sexual offence related cases, the best evidence comes from the victim as held in the case of **Seleman Mkumba vs R** (supra). The medical evidence was aimed at corroborating PW2's evidence and not otherwise.

Another complaint which was advanced by the appellant is that his defence was not considered by the trial court. He also contended that his evidence casted doubt on the prosecution case. On her part, Ms. Mkunde submitted that page 12 and 13 of the typed judgment show how the defence case was duly considered and analyzed.

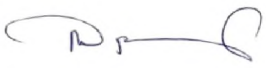
I have observed that, the appellant did not demonstrate how his evidence was not considered by the trial court. I was then inclined to examine the record and the impugned judgment. The judgment shows that, the learned trial magistrate was alive of the danger of failure to consider the defence case. He went on to analyze the appellant's evidence. At the end of the day, the learned trial magistrate was convinced that the prosecution had proved its case beyond all reasonable doubt.

Even if it is taken that the appellant's evidence was not considered, the issue is whether his evidence raised doubt on the prosecution case. First on consideration is the appellant's testimony that the case was fabricated by the victim's mother whom he owes Tshs 70,000/=. I have stated earlier on that the victim's mother testified as PW1. The appellant did not ask him anything about the said debt. Since that fact was not disclosed during the prosecution it cannot be used to discredit the prosecution case. This is also when it is considered that the case was reported to the police by the victim's teacher (PW4) and not PW1 who

knew nothing about the offence. *Second,* the appellant went on testifying that he did not confess to have committed the offence. However, cautioned statement is not the sole evidence which must be relied upon by the prosecution. This is because an accused person cannot be forced to confess to have committed the offence. In the present case, the prosecution relied on evidence adduced by its witnesses. *Third,* another evidence adduced by the appellant was to the effect that the prosecution witnesses were not credible. I have discussed herein how I find no merits on the contention that the prosecution witnesses were not credible. That being the position, it is clear that the appellant's defence did not raise doubt on the prosecution case. On the foregoing reasons, I am satisfied that the third to seventh grounds of appeal are devoid of merits.

In final analysis, I find no merit in the appeal. It is accordingly dismissed.

DATED at DAR ES SALAAM this 31st day of August, 2022.



S. E. Kisanya
JUDGE

Court: Judgment delivered this 31st day of August, 2022 in the presence of the appellant, Ms. Elizabeth Mkunde, learned Senior State Attorney for the respondent and Ms. Bahati, court clerk.

Right of appeal explained.


S.E. Kisanya
JUDGE
31/08/2022