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. 227 OF 2021

ELISHA ALEX MUSHI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Kinondoni at Kinondoni in Criminal Case No. 115 of 2020)

JUDGMENT

20th and 28th March, 2022

KISANYA, J.:

The appellant, Elisha Alex Mushi was arraigned for the offence of unnatural offence contrary to sections, 154 (1) and (2) of the Penal Code [Cap. 16, R.E. 2002, now, R. E. 2019]. He was tried by the District Court of Kinondoni at Kinondoni. It was alleged that, on 19th February, 2020 at Ubungo River Side in Embassy Kingdom Church, Ubungo District in Dar es Salaam Region, the appellant had carnal knowledge of the victim (name withheld), a boy of four (4) years of age against the order of nature.

Before going further, I find it apt to give a brief account of what led to the appellant's arraignment. In terms of the evidence adduced by the

prosecution, the appellant was an electrician of the Embassy Kingdom Church located at River Side, Ubungo District in Dar Region. On 19th February, 2020, the victim and his mother (PW1) went to worship at the Embassy Kingdom Church. The victim and other children worshiped in a separate room or class that is specifically for children. At the end of the worship service, the victim and his brother were picked by PW1. She noticed something unusual with the victim. On the next day, the victim told PW1 that he was sick. He also narrated to PW1 how the accused person undressed his short and inserted his penis in his anus, on the previous day.

That information prompted the victim's mother (PW1) to go to Embassy Kingdom Church. She met pastor Charles Simon Chuwa (PW3) who reported the matter to Bishop David Mbaga (PW4). The latter summoned the appellant, and the matter was reported to Urafiki Police Station. Thereafter, the victim was referred to Palestina Hospital for medical examination. He was examined by Dr. Gloria Aniny Lema (PW5) whose findings are to the effect that the victim had bruises and reddish at his anus. She tendered the medical examination report commonly known as PF3 which was admitted as Exhibit P2.

In his sworn evidence, the appellant denied having committed the offence against the victim. He invited the trial court to find that the victim was not credible on the account he did not name him on the fateful day. He also asked the trial court to consider that the victim's mother avoided cross-examination because she was a liar.

The trial court was satisfied that the prosecution had proved its case beyond all reasonable doubts. It went on to find the appellant guilty as charged and sentence him to thirty (30) years imprisonment.

Protesting his innocence, the appellant has lodged this appeal on eight (8) grounds of appeal. Having closely examined them, I am of the considered view that the said grounds can be conveniently reduced to three substantive grounds of appeal as follows. *First,* the trial court erred in law by sentencing the appellant while he was not convicted. *Second,* the trial court failed to comply with the provisions of section 127(2) of the Evidence Act. *Third*, the appellant was not accorded the right to cross-examine the victim. *Four*, the prosecution case was not proved beyond all reasonable doubt.

The appeal was argued by way of written submissions as per this court's order dated 9th February, 2022. I have noted that apart from the

above grounds of appeal, the appellant submitted on additional grounds of appeal without leave of the Court. In that regard, I will not address the grounds which were not stated in the petition of appeal.

The appellant commenced his submission by arguing that this Court is required to consider whether the prosecution proved its case beyond all reasonable doubts. He fortified his argument by citing the case of **Said Hemed vs R** [1987] TLR 117.

Submitting in support of the first ground of complaint, the appellant argued the trial court is required to sentence the accused person after convicting him. His submission was based on the provision of section 235 of the CPA. He went on to contend that the trial court sentenced him while he was not convicted of the offence. Citing the cases of **Jonathan Mlungnani vs R**, Criminal Appeal No. 15 of 2011, he argued that the judgment of the trial court was a nullity.

On the second ground of complaint, the appellant contended that the trial court failed to comply with the requirement of section 127(2) of the Evidence Act which requires the child of tender age to adduce evidence after promising to tell the truth and not lies. Referring the Court to the case of

Godfrey Wilson vs R, Criminal Appeal No. 159 of 2009 (unreported), he argued that the record does not show whether the trial court satisfied itself on whether PW2 knew the nature of oath and whether he promised to tell the truth. In that regard, the appellant urged this Court to expunge the testimony of PW2. He cited the cases of **Issa Salum Nambaluka vs R**, Criminal Appeal No. 272 of 2018 and **Masoud Mgosi vs R**, Criminal Appeal No. 195 of 2018, **Masanja Makunga vs R**, Criminal Appeal No. 378 of 2018 to support his prayer. He was of the view that, in the absence of evidence of PW2, there remains no evidence to implicate him on the account that evidence of PW1 was expunged by the trial court.

Submitting on the third ground of complaint, the appellant argued that he was denied the right to cross-examine the victim. Therefore, he contended that he was denied an opportunity of impeaching the victim's credibility.

With regard to the fourth ground of complaint, the appellant argued that the prosecution's case was not proved beyond all reasonable. He pointed out that the evidence adduced by PW3, PW4, PW5 and PW6 was

hearsay evidence and contradictory and that the prosecution's witnesses were not credible

Responding, Ms. Nura Manja, learned State Attorney conceded to the first and third grounds of complaints and disputed the remaining grounds of appeal.

Starting with the first ground of complaint, the learned State Attorney argued that failure to enter conviction is a fatal irregularity which is not curable under section 388(1) of the CPA. Her argument was based on the case of **Alyoce Mabele vs R**, Criminal Appeal No. 8 of 2018. Therefore, she moved the Court to remit the record to trial court for purposes of composing a proper judgment.

As to the third ground of complaint, the learned State Attorney submitted that the right to cross examine a witness called by the adverse party is provided for under section 195 (2) of the CPA. She went on to argue that failure to accord the appellant right to cross-examine PW2 occasioned a miscarriage of justice. To bolster her argument, the learned State Attorney cited the case of **Gift Mariki and 2 Other vs R**, Criminal Appeal No. 288 of 2015 (unreported).

On the second ground of complaint, the learned State Attorney was brief that the provision of section 127(2) of the CPA was complied with. Thus, she urged this Court to overrule the same.

With regard to the fourth ground of complaint, the learned State Attorney argued that the prosecution had proved its case beyond all reasonable doubts. He submitted that PW2 was a credible witness on the account that he knew the appellant at first sight. Referring the Court to the case of **Marwa Wangiti Mwita and Another vs R** [2002], she contended that the appellant was duly identified by the victim. She also submitted that there was no contradictions between the prosecution's witnesses and that there was no variance between the evidence adduced by the prosecution witnesses and the charge on the place where the offence was committed.

In conclusion, the learned State Attorney moved the Court to make an order for retrial because the appellant was denied the right to cross-examine the victim.

Submitting in rejoinder, the appellant argued that this was not a fit case for retrial. His argument was based on the reason that the prosecution witnesses contradicted themselves on the victim's age and that the victim's

evidence was taken in contravention of section 127(2) of the Evidence Act and thus, liable to be expunged.

I shall begin to consider the first ground of complaint on the trial court's failure to convict the appellant. I agree with the parties that, in terms of section 235 of the CPA, the trial court is required to make a finding on whether the accused person is guilty and enter conviction. However, I respectfully disagree with them, on the effect of sentencing without convicting the accused person. The law is now settled that such irregularity is curable under section 388 of the CPA. There is chain of authorities stating that position. This include the case of **Bahati Makeja vs R**, Criminal Appeal No. 118 of 2006 (unreported), in which the Court of Appeal held that:

> *"In the light of the above decisions, we are of the considered view that no injustice has been occasioned by the inadvertence of the judge to enter a conviction before passing sentence. In view of the above named decisions, the irregularities can be cured under section 388 of the Criminal Procedure Act."*

In another case of **Amitabachan Machaga @ Gorong'ondo v. R**, Criminal Appeal No. 271 of 2017 (unreported), the Court of Appeal observed as follows on the issue under consideration:-

> "... *we think it is not always that such omission to enter a conviction will necessarily lead to an order of remission of the record to the trial court especially, as in this case, where the justice of the case demands otherwise. In other cases, it has been considered prudent to treat the omission as a mere slip and the Court has deemed the conviction to have been entered. See the case of* ***Imani Charles Chimango vs Republic,*** *Criminal Appeal No. 382 of 2016 (unreported). We shall therefore ignore the omission and proceed with the determination of the appeal on the merit."*

Having considered that the appellant was sentenced for the charged offence and that he has not demonstrated how the trial's court failure to enter conviction affected him, I hold the view that the omission can be ignored and that it is curable under section 388 of the CPA.

Next for consideration is the second ground that the victim's evidence was taken in contravention of section 127(2) of the Evidence Act. It is settled position that the said provisions allow the child of a tender age to give evidence without taking an oath or affirmation. Further to this, it is a legal requirement that, before giving evidence, a child of tender age must promise to tell the truth to the court and not to tell lies. See also the case **Godfrey Wilson** (supra) in which the Court of Appeal went on to hold that: "*upon*

making the promise, such promise must be recorded before the evidence is taken."

In the present case, this is what transpired when the victim (PW2) appeared before the trial court:

> *"PW2: …., 5 years, Christian:-*
>
> ***Court Inquiry**: After conducting due inquiry a boy is a child of 5 years (tender age) he promises to tell the truth, hence he will adduced his evidence without an oath as he is 5 years, but his evidence will not be subject to cross examination as he knows to respond the question asked."*

In the view of the above record, I agree with the appellant that the victim (PW2) who was a child of tender age did not promise to tell the truth before adducing his evidence. The inquiry conducted by the learned Senior Resident Magistrate and the promise made by the victim ought to have been recorded in order to comply with section 127 (2) of the Evidence Act. The position set out by the case law including **Godfrey Wilson** (supra) law is to the effect that the recourse against evidence taken in contravention of section 127 (2) of the Evidence is to expunge the same. Thus, evidence of PW2 is hereby expunged.

There is yet another irregularity advanced in the fourth ground of complaint. The mandatory provision of section 195 of the CPA was not complied because the appellant was denied the right to cross-examine the victim. Guided by the case of **Gift Mariki and 2 Others** (supra), the said omission or irregularity rendered the proceedings of the trial court a nullity. It is clear that the appellant was not accorded the right to be heard. Considering further that the victim had adduced evidence which implicated the appellant, the judgment of the trial court is also a nullity because it stemmed from the vitiated proceedings.

On the way forward, the respondent urged me to make an order for retrial while the appellant submitted that this is not a fit case for retrial. The appellant's argument was based on the reasons that the prosecution had not proved its case beyond all reasonable doubts. It is an established position underlined in case of **Fatehali Manji vs R** [1966] EA 343) that a retrial will not be ordered where the conviction is set aside because of insufficiency of evidence. That being the case, the issue is whether the prosecution proved its case beyond all reasonable doubts.

Therefore, in order to consider whether this Court should order retrial of this case, I was forced to consider other grounds with a view of ascertaining whether the evidence was watertight. Having done so, I have noticed the following.

One, although PW1's evidence was expunged, there is no explanation as to her failure to appear before the trial court's for cross-examination. Considering that PW1 is the victim's mother who was the first person to be told by the victim about the offence and a witness who reported the matter to the church's leaders and the police, the trial court was enjoined to draw an adverse inference against the prosecution. In the absence of evidence of PW1, there remains no evidence to prove that the appellant was named by the victim as the one who sodomised him. This is when it is considered that evidence of PW3 and PW4 was based on the information reported to them by PW1.

Two, PW1 testified that the church's leaders (PW3 and PW4) examined the victim and found him with bruises. Such fact is not reflected in the evidence of PW3 and PW4. While PW3 testified that he referred the victim and his mother to PW4 who is the Church's Bishop, the said PW4 stated on

oath that his role was to search for the appellant and take or report him to the police.

Three, PW1 testified that the appellant was interrogated by PW2 and PW4 and that he admitted to have committed the crime. It is not known as to why such vital evidence is not found in the evidence of PW3 and PW4.

All the above considered, I agree with the appellant this is not a fit case for ordering a retrial.

In the upshot, the appeal succeeds. I proceed to quash the conviction, set aside the sentence and order that the appellant be released from prison unless held there for some other lawful cause.

DATED at DAR ES SALAAM this 28th day of March, 2022.

S.E. Kisanya
JUDGE
28/03/2022

Court: Judgment delivered 28th day of March, 2022 in the presence of the appellant in person and Ms. Angelina Nchalla, learned State Attorney for the respondent.

S.E. Kisanya
JUDGE
28/03/2022

Court: Right of appeal explained.

S.E. Kisanya
JUDGE
28/03/2022