IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 51 OF 2022

(Originating from Criminal Case No. 4 of 2019 District Court Arusha at Arusha)

ISMAIL ABEL .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

24th January & 15th March, 2023

GWAE, J.

The appellant was arraigned before the District Court of Arusha at Arusha (the trial court) in Criminal Case No. 4 of 2019 charged with the offence of unnatural offence contrary to **section 154 (1) (a) and (2)** of the **Penal Code,** Cap 16, [Revised Edition 2002 now Revised Edition of 2019 which was in two counts.

It was alleged that, on unknown dates of May, 2019 at Sekei area, within Arusha District in Arusha Region, the appellant had carnal knowledge of one "**EP**", (true identity hidden) a boy of 8 years against the order of nature. At the trial court, the prosecution called four (4) witnesses, PW1-the victim's sister, PW2-victim, PW3-investigation officer

and PW4-medical officer who examined the victim and prepared the PF3 report which was admitted for evidential value as exhibit P1. The appellant fended himself.

According to respondent, the unfortunate ordeal came into light when PW2 visited his sister, PW1 and defecated on himself. When questioned, he told PW1 that, he stays with his brother Japhet Petro and the appellant. That, during night times, the appellant used to undress him and inserted his penis into the victim's anus while threatening to beat him had he raised alarm or told anyone. Further to that, the appellant had penetrated him four times but he was afraid of telling anybody until he defecated on himself as he could not control faeces. PW1 reported the matter to the authorities which led to the appellant's apprehension. PW2 was then taken to the hospital and the medical examination was subsequently concluded that, he was penetrated against the order of nature by a blunt object.

In his defence, the appellant claimed that there was no proof that he carnally knew the victim against the order of nature. He also claimed that, he had grudges with the victim's brother whom he gave 20,000/= but has refused to pay him back, hence, fabrication of this case against him.

After full trial, the trial court was satisfied that, the respondent had proved its case to the required standard. It convicted and sentenced the appellant to serve the term of thirty (30) years' imprisonment. Aggrieved, the appellant filed this appeal comprised of thirteen grounds, nine from his Memorandum of Appeal and four additional grounds which were filed later. All grounds are as follows;

1. That, the trial magistrate erred in law and fact in being bias when presiding and conducting the trial as she failed to adhere to the rules of natural justice by granting appellant's request to adjourn the case due to reason that he was unwell.
2. That, the trial magistrate erred in law and fact in failing to note and hold that, the existence and appearance of a social welfare officer in the record of the court was illegal and unprocedural.
3. That, the trial magistrate erred in law and fact in failing to note that, although the trial was by the aid of different interpreters, none of them was sworn before the court.
4. That, the trial magistrate erred in law and fact in failing to comply with the mandatory requirement of section 312 (1) of the **Criminal Procedure Act**, [Cap 20 R.E. 2019].
5. That, the trial magistrate erred in law and fact in failing to inform the witnesses that, they were entitled to have their evidence read over to them contrary to section 210 (3) of the CPA.
6. That, the trial magistrate erred in law and fact in failing to observe and hold that, the prosecution evidence was

contradictory, unreliable and had material inconsistencies which rendered their story highly improbable to base its conviction.

7. That, the trial magistrate erred in law and fact in failing to note that, it was the duty of the court to evaluate the evidence as a whole and not in isolation.
8. That, the trial magistrate erred in law and fact in failing to consider and weigh the defence evidence which created doubts to the prosecution case.
9. That, the trial magistrate erred in law and fact in finding and holding that, the prosecution had proved their case at the required standard.
10. That, the trial court erred in law and fact in convicting and sentencing the appellant on a defective charge.
11. That, the trial court erred in law and fact in not finding that section 127 (1) of **the Evidence Act**, Cap 6 [R.E. 2019] was contravened.
12. That, the trial court erred in law and fact in failing to note that, section 21 of **the Penal Code** was not complied with.
13. That, the charge in respect of the second count is defective as it did not indicate the punishment provision.

During hearing the appellant was represented by Mr. Zuberi and Mr. Jacob, both learned advocates whereas Ms. Alice Mtenga represented the respondent, learned State Attorney.

Supporting the appeal, Mr. Zuberi prayed to abandon the 2nd, 3rd and 5th grounds of appeal. He submitted on the 10th, 12th and 13th grounds

jointly that, the charge sheet is defective due to its duplicity as the appellant was charged with two counts with the same particulars of the offence. He referred the court to the case of **Noah Paulo Gonde and Another vs. D.P.P**, Criminal Appeal No. 456 of 2017 (unreported) where the Court of Appeal of Tanzania siting at Mbeya where stated that, two counts based on the similar particulars was unnecessary as it amounted to duplicity.

He further argued, the evidence adduced by the prosecution did not specify which counts he stood charged with whereas the accused was convicted in both counts. The appellant's counsel was of the view of the complained duplicity of the charge, the appellant would not have defended himself properly which was prejudicial to him and contrary to section 21 of the Penal Code, Cap 16, R. E, 2002

He further argued that, the prosecution failed to cite the provision of the law relating to punishment, thus denial of the accused to know the nature of the sentence in the event he was found guilty. In support of his argument, he cited the case of **Geofrey Mahali vs. DPP**, Criminal Appeal No. 33 2 of 2018 (unreported) which underscored the importance of indicating punishment as a mandatory requirement to show seriousness or gravity of an offence.

On the 11th ground of appeal, learned counsel submitted that, the victim was not examined as per section 127 (2) of the Evidence Act which provides that, the court has to examine the competence of a witness of tender age as to whether or not he/she knows the nature of oath. To cement his argument, he cited the case of **John Mkorongo James vs. The Republic**; Criminal Appeal No. 498 of 2020, Court of Appeal at DSM (unreported) where the examination albeit in brief of the child of tender years was stressed. He asserted that, such omission was vital and renders the evidence valueless.

Submitting on the 1st ground of appeal, Mr. Zuberi asserted that, the appellant was unfairly treated and prejudiced as on 20th January, 2020 when PW4 appeared before the trial magistrate, the appellant sought leave of adjournment since he was sick. However, the trial magistrate denied him a fair trial as she could not adjourn the case, thus, the appellant failed to pause serious cross-examination to PW4. In the circumstances, the trial magistrate used double standards contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as the proceedings show that, the case was severally adjourned on the prayers by the prosecution to adjourn the case.

On 4th, 7th and 8th grounds learned counsel submitted them jointly that, the trial court's judgment contains no reasons for the decision and it also failed to consider the defence case which amounts to a denial of fair hearing as was held in the case of **Athumani Mussa and another vs. Republic** [1992] TLR 98.

Regarding the 6th and 9th grounds, learned counsel submitted them jointly that, the prosecution failed to prove the case to the required standard as the prosecution evidence was serious contradictory as the victim stated that he was living together with the appellant while PW3 testified that, the victim was living with his brother. It was his view that, the contradiction goes to the root of the case.

The appellant's counsel went on arguing that, the prosecution failed to call a vital one Japhet Petro, victim's brother alleged to have been living with the victim at his residence. He submitted that, in the absence of any explanation as to why the said Petro failed to appear before the trial court renders the prosecution evidence doubtful. He cited the case of **Aziz Abdallah vs. Republic** [1991] TLR 71 where it was held that, the prosecution is under obligation to call material witness otherwise an adverse inference may be drawn against them. Consequently, he prayed the appeal be allowed.

Opposing the appeal, Ms. Mtega submitted on the defective charge that, failure to cite or indicate the provision of law in respect of the punishment is curable under section 388 (1) of CPA. She added that, in the case of **Abubakary Msafiri vs. Republic**, Criminal Appeal No. 378 of 2017 CAT at Tabora, (unreported) Court of Appeal held that, non-citation was found not fatal. Regarding the two counts being similar in the charge against the appellant, Ms. Mtega submitted that, the appellant committed the same offence to the victim four times and the particulars display the offence against the appellant.

On the complained non- compliance with section 127 (2) of the Evidence Act, she submitted that, there is no need to examine the child of tender age, and the facts in the case of **John Mkorongo James** (supra) are distinguishable from the one at hand as the victim promised to tell the truth. Hence, the court complied with the provision of the law. Regarding fair hearing, learned state attorney admitted that, the appellant asked for adjournment as he was sick, however, there was no proof of his sickness. Thus, should the court find that, there was denial of right to be heard, the matter be tried *de novo*.

Admittedly, the learned state attorney argued that, the learned trial magistrate did not give any reason as to why she arrived at the decision

but this court may step into shoes of the trial court and re-evaluate the evidence including consideration of the defence evidence.

As to the complaint that, there are contradictions that go to the root of the case, she submitted that, there is no contradiction in the evidence adduced by PW2 & PW3 as both meant that the victim was living with the appellant and one Petro. According to her, the victim's evidence was satisfactory as to the offence of unnatural offence. She added that one Petro was not material witness since he was not present during the commission of the offence.

In his brief rejoinder, Mr. Zuberi reiterated his earlier submission and added that section 388 (1) of CPA does not cure the error appearing in the charge sheet. He added that, if the commission of the same offence was on four times, there would be four counts. He reiterated that, in this case, the duplicity was fatal.

Having gone through parties' submissions and trial court's records, I now proceed to discuss the grounds of appeal, I will start with the 10th, 12th and 13th grounds as they are all challenging the effectiveness of the charge sheet. It is a trite principle that, a charge sheet is a backbone in criminal cases as it establishes the sketch map of the evidence to be adduced. In the appeal at hand, appellant claims that, he was convicted

and sentenced on defective charge as there was a duplicity of a charge. Duplicity of charge was defined by Court of Appeal in **Ramadhani Mwanakatwe and 3 Others vs. Republic**, Criminal Appeal No. 198 of 2018 (unreported) to mean;

> *"The term duplicity does not feature in the CPA but section 133 (1) thereof stipulates:-*
>
> > *"(1) Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or if they form or are a part of, a series of offences of the same or a similar character"*
> >
> > *We had occasion to discuss this term in one of our previous decisions in which we held that a charge is said to be duplex if two distinct offences are contained in the same count or where an actual offence is charged along with an attempt to commit the same offence- See:* ***Director of Public Prosecutions v. Morgan Mattki & Nyaisa Makori,*** *Criminal Appeal No.133 of 2013 (unreported)."*

Merging the above position to the appeal at hand where the appellant was alleged to have committed the offence of unnatural offence on four incidents. However, the charge sheet had two counts, the first was contrary to section 154 (1) (a) (2) of the Penal Code (supra) whereas the second count was contrary to section 154 (1) (a) of the Code. The

second count did not disclose the provision regarding punishment and the prosecution's evidence did not specifically support the counts. Similarly, the evidence of PW1 and PW2 is all about the Commission of the unnatural offence for four times. That being the case, there is variety between the charge and evidence on record.

Facing the similar scenario in the case of **Adam Angelius Mpondi vs. The Republic**, Criminal Appeal No. 180 of 2018, CAT at Dsm, the Court of Appeal had this to say regarding the duplicity;

> *"This Court in the case of **Issa Juma Idrisa and Another v. The Republic**, Criminal Appeal No. 218 of 2017 (unreported) lucidly dealt with and discussed the effect of a charge being duplex. It first considered different prevailing positions on the effects of a charge sheet in various decisions of the former Court of Appeal for Eastern Africa including that of **R. v. Mongela Ngui** [1934] EACA 152 (CAK) as cited in the case of **Horace Kiti Makupe v. Republic** [1989] eKLR, and then it stated:*
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> *"In our jurisdiction, as alluded to above, an omnibus charge offends the principle of fair hearing and the usual consequence has been to quash the proceedings and judgments of the lower courts... the Court in unambiguous words held that the anomaly renders the charge fatally defective... the reason given was that an accused person must know the specific charge (offence) he is facing so that he can prepare his focused defence*

which, in the event of a duplex charge, cannot be accomplished. We think such a position is in line with the decision of the former Court of Appeal for Eastern Africa in ***R. vs. Mongela Ngui*** *(supra) that in determining whether the defect is fatal and incurable, we should find out whether the charge under consideration embarrassed or prejudiced the accused such that he could not arrange for a focused and proper defence. That is the yardstick we set in the case of* ***Jumanne Shaban Mrondo vs. Republic****, Criminal Appeal No. 282 of 2010 (unreported) where we stated that the fatality of any irregularity is dependent upon whether or not it occasioned a miscarriage of injustice."*

In our instant case, the prosecution charged the appellant in two counts but the occurrence of the incidents is said to be on the unknown date, the same month (May) and same year (2019) whereas the evidence adduced by the prosecution envisages that, the offence was committed four times at unknown dates. The variation between the evidence relating to how, many times the offence was committed and a number of counts (two counts) appearing in the charge ought to have been resolved at the stage of the trial. It would perhaps be proper if the charge was one indicating that the offence was committed on diverse dates of May 2019 or if dates of commission are known there ought to be four counts. I thus find the charge to be defective as complained.

I have also considered the appellant's complaint on the denial to be heard when PW4 appeared for testimonial purposes, the appellant stated that he was sick and therefore would be in position to clearly understand the nature of evidence adduced by PW4. In administration of justice, an accused person must be afforded an opportunity to be heard taking into account that he was not represented by a lawyer, hence unprivileged party to the proceedings.

With the above findings and without belaboring on other grounds of appeal, I find that, the charge against the appellant was defective. For the interest of justice, the prosecution is at liberty to proceed charging the appellant with the offence afresh, if it still desires to pursue the matter against.

It is so ordered.

DATED and delivered at **ARUSHA** this 15th day of March, 2023.

M. R. GWAE
JUDGE
15/03/2023