IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 133 OF 2022

(Arising from criminal case no. 222 of 2021 at the Juvenile Court of Arusha)

ERICK GASPER.....APPELLANT

VRS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last Order: 20-2-2023

Date of judgment: 9-3-2023

B.K.PHILLIP,J

The appellant herein was arraigned at the Juvenile Court of Arusha at Arusha on unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, (Cap 16, R.E.2019). The trial court found him guilty and ordered that he should be under custody at an approved school, at Irambo Mbeya for a period of two years. Aggrieved by the aforesaid sentence, through the assistance of his guardian the appellant lodged this appeal on the following grounds;

i) That the trial Magistrate grossly erred in law and fact by disregarding the fact that the charge against the accused person was not proved beyond reasonable doubts.

ii) That, the trial Magistrate erred in law and fact by entertaining facts which are not prerequisite in the required standard of proof

beyond reasonable doubt in reaching the decision on the alleged count.

iii) *That the trial Magistrate erred in law and fact for failure to consider the evidence adduced by the appellant.*

It was the prosecution's case that on different dates from January 2021 to 28th August 2021 at Sekei area within Arusha City, the appellant did have carnal knowledge of one "BE" (name withheld) eight (8) years old boy against the order of nature. The prosecution paraded three witnesses namely Ritha R. Laizer(PW1), the victim (PW2), who shall be referred to as "BE" in this judgment and WP 5722 Getrude (PW3). PW1 is BE's mother. Her testimony was to the effect that BE was nine (9) years old, a standard five pupil at Sekei Primary School. On 28th of August 2021 she noted that BE's clothes were dirty with faeces. He took him to AICC Hospital, Arusha. The Doctor checked him and after some consultation he advised her to go home and interrogate her son on what happened to him. On 30th August 2021, BE's condition became worse. She took him again to AICC hospital. The Doctor repeated his advice that she was supposed to interrogate her child. ("BE").She went back home and ask BE what happened to him but he refused to tell her what happened to him. She forced him to say the truth on what happened to him. Finally, BE told her that the appellant herein used to meet him at a football ground and after a football match he used to take him to a farm and sodomize him. Furthermore, BE told her the appellant's home. PW1 decided to look for the appellant. She went to the appellant's home but the appellant was not there. She just found the appellant's father. She continued looking for him

and finally she found him. The appellant's father told her that she can do anything she wants to the appellant. The appellant was arrested and taken to police station. The police officers directed PW1 to take BE to Mount Meru Hospital where he was admitted for two days. Thereafter, he was discharged and continued attending clinics.PW2 identified the appellant in court.

PW2, ("BE") testified that on 28th August 2021 the appellant sodomized him. He met him at a football ground playing with his fellow children. He called him and took him to a farm, undressed him and put his penis into his anus. He did so several times .Thereafter he told him to wear his clothes and go home. He knew the appellant through his friend when he was in class four. He was afraid to tell his mother that the appellant was sodomizing him because the appellant threatened to kill him if he discloses what he was doing to him. His mother came to know what happened to him because he failed to control his faeces. His mother took him to the police station where she was advised to go to hospital. At the hospital her mother was advised to ask him what had happened to him. He told his mother that the appellant sodomized him. PW2 identified the appellant in court. The appellant did not cross examine him.

PW3 was the investigator in this case. Her testimony is to the effect that he did interrogate BE who told her that the appellant sodomized him. He took him to a farm and told him to undress, and then put his penis into his anus and did so several times. She interrogated PW1, and the medical Doctor who attended BE. The doctor told her that BE was sodomized more than once and his anal muscles were very loose. He cannot control

his faeces.PW3 tendered in Court the PF 3 which was admitted as exhibit P1.

On the defence side, the appellant testified as DW1 together with other two witnesses, namely Magdalena Allan (DW2) and Alex Lyimo (DW3). On his defence the appellant denied to have sodomized BE. He testified that on the fateful day two women followed him where he was waiting for his uncle to give him money for buying fish. They took him to their residence and started beating him on allegation that he had destroyed their child (BE). They started asking BE if he is the one who sodomized him. In response, he shook his head indicating that he did not sodomize him and then he said that he was sodomized by his friend after school program in the bathroom. Then BE was asked again if he was sodomized by the appellant. He denied it. The two women wanted to start beating him again, fortunately, his uncle and grandmother arrived there. Thereafter, he was taken to the police station where he stayed for four days before he was released on police bail.

Upon being cross examined by the State Attorney, the appellant admitted that he had been arrested twice on allegations that he had committed unnatural offence and that he knows the victim ('BE').Moreover, he told the trial court that from his home to BE's home is about 100 meter and that BE did not mention any other person apart from him. He claimed that probably BE was told to mention his name.

On the other hand DW2, testified that sometimes in August 2021 at around 7.00pm the appellant's uncle asked her to accompany him to a house

where the appellant had been taken to. She agreed to accompany him. They went to a house where the appellant had been taken to and found him sitting on the floor together with two children. BE was asked what happened to him. In response he said that there is something that was done unto him by his friends in the bathroom.Then they asked him if the appellant did anything to him. In response, he shook his head indicating that the appellant did not do anything to him. Then , he asked the appellant if he did anything to BE. He denied to have done anything to BE. Thereafter, the two women told her to keep quiet. She advised them to take the appellant to the police station.

In response to the questions posed to her by the state attorney during cross examination DW3 told the trial court that she heard that the appellant had previously committed unnatural offence .He was not sure whether he sodomized BE.

DW3 is the appellant's uncle. His testimony is to the effect that sometimes in August 2021 at 7.00pm he gave the appellant money for buying food. After 10 minutes the appellant's friend informed him about the appellant's apprehension. They showed him where he was taken to. He informed the appellant's grandmother and requested to her to accompany him in search of the appellant. They managed to get into the house where the appellant was taken to. They found the appellant being beaten .BE was asked what happened to him. He mentioned one child who used to sodomize him. Thereafter, the appellant was taken to the police station. The mother of the child whose name was mentioned by BE hid him in the

house. So, he was not taken to the police station. The appellant was put under police custody for four (4) days and thereafter was charged in Court.

In this appeal the learned advocate Said Said appeared for the appellant whereas the learned State Attorney Lilian Kowero appeared for the respondent. Mr. Said's submission in support of the appeal was as follows; That the lower court's judgment is hinged on the evidence of PW2 (the victim) but the trial court did not abide to the legal requirements in taking the testimony of PW2 as stipulated in section 127 (2) of the Tanzania Evidence Act (TEA).Mr. Said contended that the trial Magistrate was required to test the competency and admissibility of the testimony of PW2 before taking his testimony. The trial Magistrate did not demonstrate how she reached at a conclusion that PW2 did not know the meaning of oath and promised to tell the truth and not lies. The trial Magistrate did not conduct the test of competence of PW2 and that omission is fatal, argued Mr. Said.

Moreover, it was Mr. Said's argument that the court's records show that the promise to tell the truth and not lies allegedly made by PW2 is in an reported speech not direct speech contrary to the acceptable legal procedures. He cited the case of **John Mkorongo James Vs Republic , Criminal Appeal No. 498 of 2022** (unreported).Relying on the case of **Athuman Ally Vs Republic, Criminal Appeal No. 61 of 2022** (unreported) , Mr. Said beseeched this court to delete the testimony of PW2 from the evidence on record. He went on submitting that once the evidence of PW2 is deleted from the evidence on record the remaining

prosecution evidence will not be sufficient to support the charge against the appellant because the testimony of PW1 and PW3 are all hear say and the PF 3 does not state who sodomized BE. He referred again this Court to the case of **John Mkorongo James** (supra) to fortify his argument.

In conclusion, Mr. Said argued that the charge against the appellant was not proved beyond reasonable doubts. He urged this court to set aside the impugned judgment.

In rebuttal, Ms. Lilian Kowero stated on the onset that she was supporting the appellant's conviction and sentence since the prosecution proved its case beyond reasonable doubts. She submitted that the court's record shows that PW2 promised to tell the truth and not lies. The court's records represent what transpired in court and cannot be easily impeached. She cited the case of **Halfan Sudi Vs Abieza Chichili (1998) TLR 527** to cement her arguments. She was emphatic that the conditions stipulated in section 127(2) of the TEA were complied with. She pointed out that the position of the law as far as proof of sexual offences is concern is that the best evidence is the evidence of the victim. She referred this court to the case of **Seleman Makumba Vs Republic (2006) TLR 306** to bolster her arguments.

Furthermore, Ms. Kowero argued that this court is supposed to look at the credibility of the witness. She was of the view that PW2 was a credible witness .His testimony was consistent and was corroborated with the testimony of PW1 and PW3. He testified that the appellant is their neighbor and he knew him. He explained very well how the appellant used

to sodomize him several times and how on 28th of August 2021 the appellant sodomized him. Ms.Kowero did not dispute that the PF3 does not indicate that the appellant is the one who sodomized BE but she argued that under normal circumstances PF3 cannot indicate the name of the accused person. It just corroborates other evidence adduced by the prosecution witnesses. She prayed for the dismissal of this appeal for lack of merit.

In rejoinder, Mr. Said contended that Ms. Kowero did not challenge the cases he referred to this court in supporting his arguments. He reiterated his submission in chief and distinguished the case of **Halfan Sudi** (supra) from the instant case on the ground that the case laws require that a testimony of a child of tender age has to be recorded in the words spoken by the child. Also, he contended that in the case of **Seleman Makumba** ((supra) the court did not deal with the application of the provision of section 127(2) of TEA, thus the same is distinguishable is from instant appeal.

Having dispassionately analyzed the submissions made by Mr. Said and Ms.Kowero, I wish to point out that in this appeal there was neither a ground of appeal challenging the way the testimony of PW2 was taken nor alleging contravention of the conditions stipulated in section 127(2) of the TEA. To say the least I can say is that Mr. Said submitted on none existing ground of appeal. The position of the law is that parties are bound by their pleadings. It is not correct for a party to submit on issues not pleaded otherwise there will be no need of filing memorandum of appeal prior to the hearing and serve the other party the same if a party to a

case can just decided to submit on issues/grounds not pleaded. It is important to take notice that submissions made by the parties have to be based on what is pleaded. The law does not allow surprises in submissions. In the case of **Bahari Oilfield Services FPZ Ltd Vs Peter Wilson , Civil Appeal No.157 of 2020 ,** (unreported) the Court of Appeal had this to say on the submissions made in support of an appeal.

"We therefore agree with Mr. Mushi that the principle that requires parties to be bound by their pleadings extends to grounds of appeal in an appeal. On that basis our conclusion is that an appellant's written and/or oral submission must be in consonance with the grounds of appeal."

[Also, see the case of **Impala Warehouse Logistics (T) Ltd Vs Samuel Kayombo & 3 others, Revision No.926 of 2018** (unreported)]

Having said the above , I could have stopped here and proceed to dismiss this appeal despite the fact that Ms. Kowero responded to Mr. Said's submission because Mr. Said did not submit on the grounds of appeal filed in court. However, for the interests of justice and without prejudice to my observations herein above, let me point out that I have read the case of **John Mkorongo James** and **Athuman Ally** (supra) referred to this court by Mr. Said in which the court of appeal discussed the application of section 127(2) of the TEA and held that failure to comply with the provision of section 127(2) is fatal. With due respect to Mr. Said, the authorities he cited are not the most recent decision of the Court of Appeal on the issue in hand. The most recent decision of the Court of Appeal on the issue in hand is the case of **Wambura Kiginga Vs The**

Republic, Criminal Appeal No.301 of 2018 which was delivered on 13th May 2022, in which the Court of Appeal upheld the conviction of the appellant despite the fact that the provisions of the section 127(2) of the TEA were not adhered to the letter and declined to delete the evidence of the child of tender age from the court's record. It said the following;

"...In the circumstances of this case, we think, as indicated a while ago, that substantive justice needs to be done even in favour of children of tender age, who while giving evidence, every circumstance, like in this case, suggests that they told the truth and not lies, even if they might not have taken oath or affirmation or promised to tell the truth and not lies in compliance with subsection (2) of section 127 of the Evidence Act. This is explained by the enactment of section 127(6) of the Evidence Act which provides that:

"(6) ***Notwithstanding the preceding provisions of this section*** *where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict,* ***if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."***

[Emphasis added]

We must confess at the outset that we construed the opening phrase, ***"Notwithstanding the preceding provisions o f this section",*** *to mean that, a conviction can be based on only subsection (6) of section 127 without complying with any other sub section of 127 including sub section (2).*

Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The conditions are; ***first,*** *that there must be clear assessment of the victim's credibility on record and;* ***second,*** *the court must record reasons that notwithstanding non compliance with section 127(2), a person of tender age still told the truth.*

We think those are the two conditions that must be fulfilled for the court to convict a suspect of sexual abuse under the above quoted section. Our understanding of the rationale for enactment of section 127 (6) of the Evidence Act, among other objectives like to get away with corroboration of the evidence of the victim of a sexual assault, was also to remove limits to the courts and give them wider ground to operate outside the confines of subsection (2) of section 127. The law also, in our view, was enacted to net the offenders who would otherwise go scot-free only because of non-compliance with subsection (2) of section 127. We must also emphasize that invoking subsection (6) of section 127, without first complying with subsection (2) of that section, should always be cautious, rare and only in exceptional circumstances. The major point is to ensure that an offender is not proclaimed innocent, just because the trial court did not follow rules of

evidence or procedure, in taking the evidence of the victim. In any event, non-compliance with subsection (2) of section 127, in no circumstance can it be a blame on the victim, but on the courts.....

.....that said, we agree with Mr. Erasto ***that because the evidence of PW1 was taken in disobedience of section 127(2) of the Evidence Act, it did not necessarily mean that the evidence did not constitute truth or authenticity.*** *In this case, we demonstrated factors showing that what the victim told the court was the truth and the victim was entitled to the benefit from the provisions of section 127(6) of the Evidence Act. In summary, we cannot expunge the evidence of the victim from the record, so we proceed to determine the appeal as presented."*

(emphasis added)

Back to the instant appeal, I agree with Mr. Said that the trial Magistrate failed to comply with the requirements stipulated in section 127(2) of the TEA to the letter as it was in the case of **Wambura Kiginga** (supra). However, I have perused the court's records and the same reveal that PW2's testimony was clear and consistent. He explained very well how the appellant sodomized him and identified him in court. He told the court that the appellant is his neighbor something which was also admitted by the appellant in his response to the questions posed to him during cross examination. The court's records reveal that the appellant did not cross examine PW2. That is a great indication that PW2 spoke the truth and not lies that is why the appellant had nothing to contradict him on what he testified. Under normal circumstances, had it been that PW2 lied before

the court, the appellant would have seriously cross examined him to contradict his assertions.

From the foregoing it is the finding of this court that PW2 told the trial court the truth and not lies. PW2 was a credible witness. On the strength of the decision of the Court of Appeal in the case of **Wambura kiginga** (supra), it is the finding of this court that even if Mr. Said would have included in the memorandum of appeal a ground of appeal on non-compliance of section 127(2) of the TEA, there is no any justifiable reason to delete PW2's testimony from the court's record.

As correctly submitted by Ms. Kowero, in sexual offence cases the victim's evidence is the best evidence. In this case the testimony of PW1, PW2, and PW3 together with the PF 3 prove beyond reasonable doubt that BE was sodomized by the appellant. In the upshot this appeal is dismissed in its entirety. It is so ordered.

Dated this 9th day of March 2023

B.K.PHILLIP

JUDGE.