IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 55 OF 2022

(Originating from Moshi District Court in Criminal Case No. 360 of 2020)

JIMMY S/O ELISONGUO METTA .....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

23rd March & 30th May 2023

A.P.KILIMI, J.:

The appellant hereinabove was arraigned at Moshi District Court for two counts, both for the offence of unnatural offence c/s 154 (1) (a) of the Penal Code [cap. 16 R.E 2019]. The particulars of the offence alleged by the prosecution were to the effect that; On the month of August, 2020 at Old Moshi Tela area within the District of Moshi in Kilimanjaro region, the Appellant did have carnal knowledge against the order of nature of the victims XA and XB (all in pseudonym), who were all boys aged 11 and 10 years old respectively. The appellant pleaded not guilty.

According to the facts led to appellant trial gleaned from the record, were to the effect that,The two victims were sharing one sleeping room with the appellant who is their brother. Sometimes in August, 2020 the street chairman (PW3) who also works as legal assistant at the said area received information from an informer that the victims were being sexually abused. PW3 decided to share this information to the victims' head teacher (PW5). Then PW5 and PW3 convened a meeting and called the victims for purpose of interrogating them. The victims revealed that they were being sodomized by the appellant during night. The matter was reported at Majengo police station and the victims were taken to Mawenzi Regional Hospital. Thereat they were attended by Clinical Officer (PW6) who examined both victims and found, the victim XA had no any sign of being penetrated, while victim XB had had bruises in his anus and his sphincter muscles were loosen, she concluded that he sodomized. To rescue them the victim were moved from their home to the orphanage centre. Later the appellant was arrested and charged as stated above.

The appellant in his defence denied to commit the alleged crime, and said he don't stay in one roof with the victims. But is the one who take care of the victims. He further defended that he had a conflict with the

street chairman (PW3) because he refused his father to sell a farm to her, thus said his case was plotted.

Having heard the entire case on merit, the trial court found the case proved by the prosecution beyond reasonable doubt, then held the appellant guilty, convicted him and sentenced him to life imprisonment.

Aggrieved by the conviction and sentence of the trial court, the appellant has referred this appeal basing on the following grounds;

1. That, the trial court grossly erred both in law and fact when convicted and sentenced the Appellant while the charge sheet was fatally and incurably defective.
2. That, the learned trial magistrate grossly erred both in law and fact in failing to be scrupulous to note that, if the PW1 's evidence did not tally with that of the Medical Doctor there could be highly possibility that even the evidence of PW2 was fabricated against the Appellant.
3. That, the learned trial magistrate grossly erred both in law and fact in failing to note that, the prosecution witnesses gave very highly improbable evidence which were supposed to be approached with caution as it demonstrated a manifest intention or desire to lie in order to achieve or attain a certain end.
4. That, the learned trial magistrate grossly erred both in law and fact in convicting the Appellant basing on weak, tenuous, inconsistency, incredible and wholly unreliable prosecution evidence from prosecution Witnesses.
5. That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the Appellant despite the charge being not proved beyond reasonable doubt against the Appellant and to the required standard by the law.

In the course of hearing this appeal, the appellant stood himself while the Republic was represented by Mary Lucas learned Senior State Attorney. Both agreed and prayed this appeal be argued by way of written submissions. Consequently the scheduling order for filing the same was issued and complied.

To support his appeal the appellant submitted in respect to first ground that, On carefully scrutiny on the charge sheet, one will recognize that the said charge did not cite the provision providing the punishment/sentence the Appellant would have faced if found guilty. The Omission Occasioned a miscarriage of justice against the Appellant because apart from not understand the nature of the seriousness of the charge facing him, the appellant was not aware of the consequential punishment of life imprisonment. Therefore, he is asking where did the trial magistrate got the section which she used to sentence the Appellant. To fortify his view, he cited the case of **Godfrey Simon and Another v. Republic Criminal Appeal No. 296 of 2018** CAT at Arusha and **Musa Nuru @ Saguti v.Republic, Criminal Appeal No. 66 of 2017.** (TANZLII)

The appellant further submitted on another issue that, the witness PW1 and PW2 gave very highly improbable evidence which was supposed to be approached with great caution as it demonstrates a manifest intention or desire to lie in order to achieve a certain end. Because their evidence versus that of the Medical Practitioner (PW6) of will notice that, there is something suspicious behind this case and that the same was concocted against the Appellant. He took the example of PW1 who after medically examined was seen was not penetrated which shows that PW1 lied and fabricated a very serious against him, therefore nothing can prevent PW1 to do the same as PW1. The appellant did not go further to argue on the remaining ground, thus proceeded to pray this court to allow the appeal.

In reply Ms. Mary Lucas contended that, the charge sheet is not defective as the appellant have been charged and convicted with two counts of the offence of Unnatural offence contrary to section 154 (1) (a) of the Penal Code. The prosecution side failed to site paragraph 2 of the section which provides for the punishment. Failure to put the said paragraph does not render the charge to be defective as the content of the charge and the particulars of the offence described the offence and the

appellant at the time when the charge read, he understood and entered his plea, therefore conviction and sentence passed by the trial magistrate falls within the ambit of the law. Therefore, the omission done does not render any injustice to the appellant hence it is curable under Section 388 of the Criminal Procedure Act CAP 20 R.E 2022.

Ms. Mary Lucas further consolidated ground number two and three and submitted that through the testimony of the victim (PW 1) at page 8, the trial magistrate after assessing the child's intelligence and his promise to tell the truth the evidence was taken therefore section 127(2) complied and the trial magistrate believed that the child tells nothing but the truth as provided for under section 127(6) and therefore basing on this the appellant was rightly convicted. To support her observation referred the case of **Robert Sanganya v. Republic**, Criminal Appeal No.363 of 2019 and **Goodluck Kyando v. Republic**, Criminal Appeal No.118 of 2003 (both unreported). The learned Senior State Attorney further contended he difference found on doctors' testimony is immaterial and does not go to the root of the case, basing on the reason that the best evidence of sexually offences comes from the victim. Then the trial court had good and cogent

reason for believing the testimony given by PW1. To buttress her stance referred the case of **Selemani Makumba v. R**, (2006) TLR.23.

Responding to ground number four and five, Mary Lucas contended that, PW1 and PW2 in their testimony gave an account of direct evidence as the best evidence as per section 61 and 62 of the Evidence Act Cap 6 RE 2022. Which was well underscored in the case of **Athuman Rashid v. Republic**, Criminal Appeal No.264 of 2016. (Tanzlii). Further she added that their evidences are coherent and consistency, they are the victims of the sexual offence and on their testimonies they both explained how did the appellant ravished them in different occasions. Therefore, the trial magistrate properly assessed their credibility and found their testimony to be credible and free from any contradictions, and henceforth he convicted the appellant rightly. To support this argument, she referred the case of **Shaban Daudi v. Republic**, Criminal Appeal No.20 of 2001 (Tanzlii) and prayed the appeal be dismissed.

In determining the above submitted, I have considered and scanned the entire record at the trial which shows the evidence adduced, and now I resolve the above grounds as follows; Starting with the first ground, it is true upon my perusal, it is true the two counts charged against the

appellant did not specify the provision providing for punishment which is section 154(2) of the Penal Code Cap.16. Nevertheless, even in the last convicting order of the trial court, the same was not stated. I wish to reproduce what the trial court stated at page seven of the typed Judgment;

> *"Having said so, I hereby find the accused person guilty of unnatural offence c/s 154 (1) (a) of the Penal Code (supra) and accordingly convict him of both two counts as charged."*

It is settled law that, the charge is the foundation of any trial, the mode of framing the charge is prescribed and regulated by the provisions of section 132 and 135 (a) (ii) of the CPA. While the former provision requires the offence to be stated in the charge along with specific particulars stating the nature of the charged offence, the latter one requires the statement to be described together with the essential elements of the offence and reference to the section creating the offence. In addition, the punishment provision must be stated in the charge. (See **Godfrey Simon and Another v. Republic** (supra). This was also emphasized by the Court in a number of cases including the cases of **Said Hussein v. Republic,** Criminal Appeal No. 110 of 2016, **Geofrey James Mahali v. The**

Director of Public Prosecutions, Criminal Appeal No. 332 of 2018 (all unreported) to mentioned few.

Having mindful of the above, it is therefore necessary requirement to specify in the charge the provision providing for sentence so as to enable an accused person to understand the nature of the charged offence and the requisite punishment. Since in the present case, the same was not complied with, this means the appellant was prejudice by not made aware of the serious implications of the offence charged, the gravity of the impending sentence and thus he was unable to make an informed defence.

In view of the above, I concede with the appellant submission when he referred the case of **Mussa Nuru @ Saguti v. Republic** (supra) which in fact succumbed in a similar scenario, whereby punishment provision was not cited in the charge sheet, the Court of appeal had this to say:

> *"Even in this case, we think, the appellant was required to know clearly the offence he was charged with together with the proper punishment attached to it. We are of a settled mind that* ***by failing to cite sub section (2) of section 154 which is a specific provision for punishment to a person who committed an offence of unnatural offence to a person below the age of [eighteen]***

might have led the appellant not to appreciate the seriousness of the offence which was laid at his door. On top of that he might not have been in a position to prepare his defence. The end result of it is that he was prejudiced"
[Emphasis supplied]

In her defence the learned Senior State Attorney contended that failure to put the said provision does not render the charge to be defective as the content of the charge and since the particulars of the offence described the offence was read to appellant, therefore no any injustice to the appellant hence it is curable under Section 388 of the Criminal Procedure Act CAP 20 R.E 2022.

With respect, in my view, since the case was heard and concluded under defective charge, this cannot be remedied at this stage of appeal by the provision cited. This was only possible before the conclusion of the trial if the prosecution had sought leave of the trial court to amend the charge in terms of section 234 (1) of the CPA. And for purpose of clarity hereunder, I reproduce the said provision;

"234 (1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the

charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just."

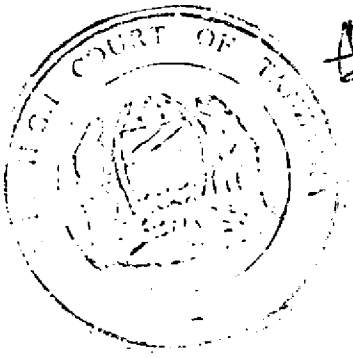
In the circumstances, since the above requirement was not done, therefore, this means the verdict was entered while the charge was defective. It is my considered opinion vitiated the whole proceedings and judgment, thus rendered them to nullity.

In the circumstances, and having considered the remaining grounds, I find that the determination of this ground is sufficient to dispose the appeal and find no need to consider and determine the remaining grounds of appeal.

For the reasons state above, the conviction of the appellant was vitiated with legal flaws which render it to be unsustainable. I thus find this appeal therefore have merit and consequently the conviction of the appellant is quashed and sentence set aside. The appellant should therefore immediately be released from prison unless lawfully being held.

It is ordered accordingly.

DATED at **MOSHI** this 30th day of May, 2023.



A. P. KILIMI

JUDGE

30/5/2023