IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

CRIMINAL APPEAL NO. 138 OF 2017

(From the decision of the District Court of Urambo, Original Criminal Case No. 01 of 2017, before Hon. H. M. Momba, RM)

CHARLES S/O LUHEMEJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 22/05/2023
Date of Judgment: 29/05/2023

KADILU, J.

In the District Court of Urambo, the appellant was charged with unnatural offence contrary to Section 154 (1) (a) and (2) of the Penal Code [Cap. 16, R.E. 2002]. It is alleged by the prosecution that on 25/12/2016, at Ugansa Hamlet, Usinge Ward within Kaliua District in Tabora Region, the appellant had carnal knowledge against the order of nature of a male child aged three (03) years old whose name I have camouflaged and henceforth refer him as "the victim." It was the prosecution's assertion that around 18:30hrs on the fateful day, the appellant was drunk then, he took the victim to his room and sodomised him.

The fact that the appellant and the victim were familiar to each other is not disputed as the appellant was a close friend of the victim's father and the appellant used to go to the victim's father's residence several times. After the incident, the appellant was arrested on 27/12/2016 and was taken to Usinge Police Station whereby his cautioned statement was recorded by F. 948 D/C Ndwanko. He was later on 28/12/2016 transferred to Kaliua Police Station and on 02/01/2017, he was arraigned to Urambo District Court.

At the conclusion of the trial, the appellant was convicted for the charged offence. He was sentenced to life imprisonment. Dissatisfied with the conviction and sentence, the appellant filed this appeal praying for the court to allow the appeal, quash the conviction, set aside the sentence and order his release from the prison due to the following grounds:

1. *That, the appellant did not commit the charged offence as established by the prosecution witnesses during the trial.*
2. *That, the victim was not subjected to voire dire test as required by the law.*
3. *That, the learned trial Magistrate wrongly convicted the appellant without considering whether the male organ could penetrate in the anus of a three (3) years boy without causing rapture. Further, the learned trial Magistrate did not consider the reasons as to why the alleged blood-stained garment of the victim was not produced in evidence to authenticate their bare assertion.*

4. *That, the learned trial Magistrate totally erred in law and violated Section 231 (1) (a) and (b) of the Criminal Procedure Act, [Cap. 20 R.E. 2002] for failure to inform the accused his right to defend.*

On the day of hearing, the appellant appeared in person, unrepresented and prayed the court to adopt his petition of appeal. Being a lay person, he had nothing substantial to submit apart from maintaining that he did not commit the alleged offence. He informed the court that he had a quarrel with the victim's mother, then she decided to implant the alleged offence on him. He explained that at one point in his life, he cohabited with the mother of the victim for three months. They broke out and he married another woman who happened to be an aunt of his previous concubine. The concubine told him that she would teach him a lesson hence, this case.

The respondent Republic was represented by Ms. Tunosye John Luketa, learned State Attorney. She generally objected the appeal and stated that all the grounds of appeal are baseless. Submitting on the 1st ground of appeal, Ms. Tunosye stated that the trial court considered prosecution evidence as a whole which included oral testimony and documentary evidence. According to her, the trial court was convinced by the said evidence and found that the appellant committed the offence which he stood charged with. Regarding the 2nd ground of appeal in which the appellant asserted that victim of the offence was not subjected to voire dire test, Ms. Tunosye argued that the victim of the offence was a child of three years who

did not testify in this case so, there was no need for the court to conduct voire dire test.

The other complaint by the appellant in his 3rd ground of appeal was that he was wrongly convicted as the trial court did not resolve the questions posed by him. Ms. Tunosye responded that Section 312 of the Criminal Procedure Act [Cap. 20 R.E. 2019] is clear about the contents of a judgment. She said, the provision does not give room for the appellant to raise his own questions and seek answers from the court. The learned State Attorney explained that judgment of the trial court is full of reasons for the conviction as shown from page 2 to 3 of the typed judgment.

Concerning the 4th ground of appeal whereby the appellant complains that Section 231 (1) of the Criminal Procedure Act was violated as he was not informed about his right to defend himself and call witnesses, Ms. Tunosye stated that the appellant presented his defence during the trial and closed his case voluntarily as shown on page 12 of the trial court's proceedings. The appellant contends further that the court did not consider that he was an unrepresented lay person who did not understand the language used by the trial court and the prosecution side. On this point, the State Attorney explained that the appellant did not inform the court that he was not conversant with the language used in the trial.

She referred to the case of ***Marmou Slaa @ Hofu v R.***, Criminal Appeal No. 2 of 2020 in which it was stated that being a lay person is never

a defence known in law. She then submitted that the trial court was justified to convict and sentence the appellant as that is what the law requires after the charge is proved. She prayed for this court to uphold the conviction and sentence of the appellant as passed by the trial court.

In the course of composing the judgment, I observed some procedural irregularities which are apparent on the records of the trial court. The irregularities were not among the grounds of appeal and they were not pointed out at the hearing of the appeal. I therefore invited the parties to address the court on the issue. The irregularities relate to the admission of PW4's testimony by the trial court and the procedure used in the admission of exhibit "P1" (PF3). It is apparent from the record that the exhibit was tendered by PW1, a police officer who investigated the case whereas the doctor who made the PF3 testified as PW2 on the same day. The exhibit was not cleared for admission, neither was it read out aloud after the admission. The proceedings indicate as follows on page 4:

PW1: *"... the boy was checked at the hospital and the doctor proved that the boy was sodomised."*
Court: *"Section 240 of the CPA complied with. The accused asked who he wishes to tender PF3."*
Accused: *"The investigator may tender it."*
Court: *"PF3 of the victim is admitted as exhibit "P1."*
That is all.

Mr. Steven Mnzava, State Attorney addressed this court about the manner in which PF3 was admitted by the trial court. He explained that the

PF3 was tendered by PW1, a police officer who was a mere custodian and not the author of that exhibit. According to Mr. Steven, PW1 was not in a position to read the PF3 aloud as she was not the one who prepared it and had no expertise about medical issues. Concerning the testimony of PW4, Mr. Steven conceded that being a child of tender age, before testifying PW4 was required to promise the court that she would tell the truth and not lies. However, the learned State Attorney argued that the appellant was not convicted based on the testimony of PW4 and PF3 alone so, the remaining evidence is sufficient to justify the conviction and sentence.

The record is clear that PW4 who was a key witness in this case, was aged seven (07) years during the trial. She was the one who informed the mother of the victim that it was the appellant who took her young brother into a room and sodomized him. Since the offence was committed after the amendment to Section 127 (2) of the Evidence Act, [Cap. 6 R.E. 2002], it was mandatory for the trial court to ensure that PW4 had promised to tell the truth to the court and not to tell any lies. Proceedings of the trial court do not show that the court did consider or determine this issue before PW4 started to testify.

Therefore, the issue is whether evidence of PW4 and exhibit "P1" namely, PF3 were properly admitted in the trial court. Mr. Mnzava, addressing the court on this point agreed that trial court's records are silent on whether or not PF3 was read out aloud. In reply, the appellant prayed this court to assist him as he did not understand what went on in the trial

court when PF3 was produced. He prayed for the appeal to be allowed because he did not commit the offence as alleged.

Having gone through the evidence on record, the petition of appeal and submissions of the parties, the issue for determination is whether the case against the appellant was proved beyond reasonable doubt. I will not however, deal with the grounds of appeal raised by the appellant following the anomalies I have noticed as shown above.

The fact that PW4's evidence was recorded on 29/03/2017 which was after the amendment to Section 127 (2) of the Evidence Act as brought by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 which came into force on 8/7/2016, in essence meant that without complying with the above provision, evidence of a child of seven years old was not properly received by the court. This is because section 127 (2) reads:

> *A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.*

Although PW4 was a child of tender age, she neither took an oath/affirmation nor did she promise to tell the truth to the court. Thus, the child's evidence was admitted without the court satisfying itself that she understood the duty of speaking the truth. The court was required to determine if the child possessed sufficient intelligence to justify recording of her evidence without oath or affirmation. (*See, Kilaga Daniel v R.*, Criminal

Appeal No. 425 of 2017. In the instant case, when PW4 was called to testify before the trial court, the court proceeded as follows:

PW4 – "My name is Sophy, 07 years of age. I live with my mother at Ugansa Village. My young brother is ... (the victim) and my little sister is Fatu. I know this person named Charles. He is my babu. ..."

Applying the provisions of section 127 (2) of the Evidence Act to what transpired in the court, it cannot be said that the law was complied with. The excerpt above clearly shows that the questions asked to PW4 did not relate to whether or not she knew the meaning of telling the truth rather, they were general questions on the witness's personal particulars only. There is nothing to show that the trial court inquired on the witness's understanding of the duty to speak the truth. Since the omission is fatal, its effect is that I shall disregard PW4's evidence in my deliberation and determination of this appeal.

Concerning PF3 which was not read out aloud after admission by the trial court, the leaned State Attorney said he would leave it to the court to decide its effect. In the case of *Huang Qin & Another v R.*, Criminal Appeal No. 173 of 2018, the Court of Appeal was faced with a similar situation of failure to read out the exhibits after being cleared for admission. It stated:

> *"... Failure to read the exhibits in court was a fatal omission because it offended the principle of fair trial as the appellants could not have known the contents of the exhibits tendered against them. ..."*

Further, in the case of ***Robinson Mwanjisi & 3 Others v. R.,*** [2003] TLR 218, the Court emphasized the requirement of reading over the document after it has been cleared for admission and actually admitted. Again, in the case of ***Anania Clavery Beteia v R.***, Criminal Application No. 46 0f 2020, the Court of Appeal of Tanzania at Dar es Salaam, it was stated that failure to read over the exhibits after being cleared for admission and admitted in evidence was wrong and prejudicial. I fully subscribe to the above authorities.

In the instant matter, PF3 was not read out after being cleared for admission in court. The said exhibit (PF3) was crucial in proving the case against the appellant as it was the only exhibit tendered by the prosecution side. It is settled law that, failure to read out the contents of any documentary exhibit after its admission into evidence as happened in this case, is very fatal. According to case-law, such an exhibit ceases to have any evidential value and is liable to be expunged from the record. The position was expounded in ***Sebastian Michael v The DPP***, Criminal Appeal No. 145 of 2018, the Court of Appeal of Tanzania at Mbeya and in the case of ***Issa Hassani Uki v R.,*** Criminal Appeal No. 129 of 2017, the Court of Appeal of Tanzania at Mtwara.

From what is provided in the referred cases above, I expunge the PF3 (exhibit P1) from the records of the court. I am of a considered view that the omission to read the contents of the said exhibit is fatal, even Section

388 of the Criminal Procedure Act which gives an option to order a retrial cannot cure the same. The principle as to whether or not to order a retrial was laid down in the case of ***Fatehali Manji v R.***, [1966] EA, 343 in which it was stated that:

> *In general, a retrial will be ordered when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of a trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."*

Therefore, this is not a fit case to order a retrial. Having expunged the said exhibit, the issue which follows is whether the remaining evidence suffices to prove the case against the appellant beyond reasonable doubt. The answer is in negative as it was indicated earlier that exhibit "P1" was the only documentary evidence tendered by the prosecution. It may be recalled that evidence of PW4 was also disregarded for being admitted irregularly. PW4 was the only witness who testified that she saw the appellant taking the victim to his room. The two pieces of evidence which have been disregarded and expunged from the records touches to the root of the prosecution case.

In the premises, I am of the view that determination of the above issues is enough to dispose of this appeal. I thus find no compelling need to dwell on the remaining grievances raised by the appellant. Consequently, I allow the appeal, quash the conviction of the appellant and set aside the sentence imposed on him. I order for the appellant to be released from prison immediately unless held for another lawful cause. Right of appeal is open to any aggrieved party.

Order accordingly.

KADILU, M.J.,

JUDGE

29/05/2023

Judgement delivered in chamber on the 29th Day of May, 2023 in the presence of the appellant and Mr. Steven Mnzava accompanied by Ms. Upendo Florian, State Attorneys for the respondent, Republic.

KADILU, M. J.

JUDGE

29/05/2023.