IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
CRIMINAL APPEAL NO. 68 OF 2021
C/F Criminal Case No. 39 of 2020 District Court of Hai at Hai)

RAMADHANI ROMAN TESHA .....APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 16/12/2022
Judgment: 23.01.2023

MASABO, J.:-

Ramadhan Roman Tesha, the appellant herein, stood charged before the District Court of Hai at Hai for unnatural offence contrary to section 154 (1) (a), 2 of the Penal Code [Cap 16 R.E. 2019]. It was alleged that, on 23.01.2020 at Bomang'ombe Msikitini area within Hai District, Kilimanjaro Region, the appellant carnally knew his biological child, one **SR** (true identity concealed), a boy child aged 6, against the order of nature.

The factual background was that, when SR was of 7 months old, his parents separated and he remained under the custody who has since then lived with him as single parent until the date when the incident came to light. It was alleged by the prosecution that during this time the used to sodomised the victim to the extent that his sphincter muscles became loose and could no longer control faeces. Having seen that the victim was passing faeces uncontrollably, the appellant decided to take him to hospital for treatment .

While there, SR was medically examined by PW2 who found out that SR was penetrated several times by a blunt object as his sphincter muscles were loose. Probed by PW2 as to what has happened to him, SR disclosed that his father was molesting him.PW2 reported the matter to the authorities. The appellant was arrested and charged.

In his defence, the appellant repudiated the charges. He claimed that the victim has a bowel movement sickness since his infanthood and has been receiving treatments from various private and public hospitals without success. The defence was found lame and was consequently conviction and sentenced to life imprisonment. Disgruntled by the conviction and sentence, the appellant has approached this court challenging the conviction and sentence on the following grounds of appeal;

1. The trial magistrate erred in law and fact in failing to fully adhere to section 127 (2) of the Evidence Act, Cap 6 R.E. 2019;
2. The trial successor magistrate erred in law in convicting the appellant basing on an irregular proceeding which was contrary to section 214 of the Criminal Procedure Act, Cap 20 R.E. 2019 which sets out the succession of trial by a magistrate;
3. The successor magistrate erred in law and in fact in failing to note that the evidence on record does not support the charge laid against the appellant as the charge sheet alleged that the offence occurred on 23/1/2020 whereas the victim stated that he was molested for the last time on 21/1/2020;

4. The successor magistrate erred in law in failing to note that the case was fabricated as the victim stated that her mother was at the hospital whereas the doctor, PW2 said nothing;
5. The successor magistrate misdirected herself and used speculative ideas in composing her judgment as she quoted victim's words which were not in the proceedings;
6. The successor magistrate erred in law and in fact in failing to note that, the contents of exhibit P1, the PF3, was not read aloud in court after admission;
7. The successor magistrate failed to note that the victim was couched on what to say before the court by his unsummoned mother and prosecution;
8. The successor magistrate erred in law and in fact in convicting the appellant on an irregular proceeding;
9. The successor magistrate erred in law and in fact in convicting and sentencing the appellant without according him a fair trial;
10. The successor magistrate erred in law and fact in omitting some issues which were raised by the witness and the appellant during the trial; and
11. The successor magistrate erred in law and fact in convicting the appellant despite the charge not being proved beyond reasonable doubt.

Submitting in support of the appeal, the appellant who appeared in person, unrepresented, submitted on all grounds jointly that, the victim was couched

to tell the court that the appellant sexually assaulted him. He believes so because in the course of his testimony, the victim was taken out of the courtroom and brought back to continue testifying. Disgruntled, he requested the trial magistrate to recuse herself but she denied hence perpetuated injustice to him. He maintained that he could not molest his own son as he loved him and has been living with him since he was young. He finally prayed that the appeal be allowed, the conviction and sentence be quashed and set aside and he be discharged.

In rebuttal, Ms. Mary Lucas, learned State Attorney for the respondent submitted that the case against the appellant was proved to the required standard. Starting with the 1st, 2nd, 5th and 9 ground of appeal she submitted that, they are all baseless. She argued that, when the case was transferred from Hon. Mawole to Hon. Jasmin, the appellant was notified of the transfer as seen at page 4 of the proceedings. Thus, the requirement of section 214 of the Criminal Procedure Act was fully complied with as the appellant was not properly addressed. Also, at that time the matter was at early stage. It was still on preliminary hearing and when the case file was transferred back to the predecessor magistrate he was duly addressed. On the second ground she submitted that the victim's testimony was procured in total compliance with the provision of section 127 (2) of the Evidence Act regulating admission of evidence of a child of tender age.

She further submitted that evidence brought before trial court proved without reasonable doubt that the appellant committed an unnatural offence

against his biological son contrary to section 154 of the Penal Code. At page 10 to 11 of the proceedings the victim narrated how the appellant penetrated him against the order of nature several times at night. Further, the trial court found him reliable and trusted his evidence which in law is the best evidence as held in **Seleman Makumba Vs. R** [2006] TLR 379. She added that as held in **Goodluck Kyando v R** [206] TLR 363 and in **Elias Mwangoka @ Kingoli v R,** Criminal Appeal No. 96 of 2019, CAT, assessment of credibility of a witness is in the domain of the trial court. Therefore, since in this case the trial court was satisfied with PW1's credibility's, there no reason to disbelieve him.

Moreover, Ms. Lucas argued that the doctor who examined the victim demonstrated how she examined the victim and found that his anus was penetrated and reported the matter to the authorities. Apart form that, PW3, the investigator of the case who recorded the victim's statement testified that the victim confided in him that it was the appellant who was sodomizing him. In that regard, contradictions if any in the prosecution's case were minor as they do not go to the root of the case. She prayed that this appeal be dismissed and the conviction and sentence be upheld.

In his brief rejoinder, the appellant submitted that the victim has medical condition and that he had documents to that effect but he could not produce them in court as he had no access to the same owing to his being under custody throughout the trial of his case. Also, for similar reasons he could not call his neighbours to testify in his defence.

I have dispassionately considered the submission by the parties and the lower court record placed before me which I have thoroughly examined. This appeal being a first appeal is tantamount to a re- hearing. As held by the Court of Appeal in the **Director of Public Prosecutions vs Mussa Hatibu Sembe** (Criminal Appeal 130 of 2021);

> First appeal is in the form of re-hearing where the court is mandated to revisit the evidence from both sides and if possible, to come out with its own finding. This principle has been embraced by the Court in its previous decisions including **Nicholaus Mgonja @ Makaa v. R**, Criminal Appeal No. 85 of 2020; **Trazias Evarista @ Deusdedit Aron v. R**, Criminal Appeal No. 188 of 2020; and **Ester Jofrey Lyimo v. R**, Criminal Appeal No. 123 of 2020 (all unreported)

As the appellant was convicted of unnatural offence, it is expected that, at the end of the re-hearing, I should come up with a finding on whether the charges against the appellant were proved. I prefer to biggin with the third ground regard the asserted variance between the charge sheet and the evidence rendered by the prosecution. The appellant's point in this ground is that, the charge sheet alleged that he committed the offence on 23/1/2020, whereas the victim told PW3 that he was molested on diverse days the last one being on 21/1/2020. In the course of examining the record, I have observed that the particulars of the offence as set out in the charge sheet filed in court on 30th January 2020, is that the appellant committed the offence "*on 23rd day of January 2020*". In his testimony, the victim did not specify the date of the offence in his testimony. The only witness who alluded

to the date was PW3 who stated that in the course of interrogation, the victim told him that the last date the appellant molested him was on 21st January 2020.

The law as articulated by the Court of Appeal in the case of **Said Msusa vs Republic**, Criminal Appeal No. 268 of 2013 and followed in subsequent decisions such as in **Salum Rashid Chitende v. R**, Criminal Appeal No. 204 of 2015 (unreported) and **Godfrey Simoni & Masai Yosia v The Republic**, Criminal Appeal No. 296 of 2018 is that, when a specific date, time and place of the incidence is mentioned in the charge sheet, the prosecution is obligated bound to lead evidence in proof that the offence was committed on that specific date, time or place. A variance, if any between the charge sheet and the evidence led by the prosecution can be cured through an amendment of the charge under Section 234 (3) of the CPA which states thus;

> "234.-(3) ariance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."

The amendment to cure the disparity need be done before pronouncement of judgment as held in **Mussa Mutalemwa v R** Criminal Appeal No. 172 of 1990 (unreported) and **Joseph Sypriano v R** Criminal Appeal No. 158 of 2011 (unreported) both cited in **Said Msusa vs Republic**, Criminal Appeal No. 268 of 2013 (unreported). In these cases, it was concurrently held that

the amendment must be done before judgment otherwise the judgment runs the risk of being quashed on appeal on account of such discrepancy. It was therefore upon the prosecution to rectify the anomaly by moving the court for an amendment of the chargesheet before the pronouncement of the judgment so as to reconcile the charge and the evidence but this was not done.

In a further scrutiny of the record, I have observed that there is a leaf of a charge sheet loosely placed in the case file suggesting that there was an attempt to reconcile the record through amendment/substitution of the charge. The contemplated charge sheet is dated 30/6/2020 and contains 21/1/2020 as the date of the incidence. Since there is no indication whatsoever that it was not formally recorded and the record is silent on how it got itself there, it is presumed that it remained a mere contemplation. This was a fatal mistake on the prosecution's side as it rendered the proceedings fatally and incurably defective.

The ground I will now turn to is the first ground of appeal on compliance with section 127(2) of the Evidence Act [Cap 6 RE 2019]. In support of this ground, it has been ardently argued that the trial court proceedings offended the requirement of this provision. The argument was strongly repudiated by Ms. Lucas who has argued that there was fully compliance with the provision. She has argued further that, the appellant was correctly convicted based on the evidence of the victim which was not only recorded

in total compliance with the law but was the best evidence under the circumstances hence sufficient to ground a conviction.

Section 127(2) of the Evidence Act, provides that a child of tender age may give evidence on oath/affirmation or upon an undertaking to tell the truth to the court and not to tell lies. Also, as correctly submitted by the learned State Attorney in trials involving sexual offences such as the one at hand, the testimony of the victim of tender age if recorded in compliance with the above provision is regarded as the best evidence hence sufficient to ground a conviction as per section 127 (6) and as held in **Seleman Makumba v R** [2006] TLR 379 and in a plethora of subsequent authorities. The law is now settled that, much as section 127(2) is silent on the modality for procuring the undertaking to tell the truth and not lies, it is trite that, prior to administering the oath or requiring the child to make an undertaking to tell the truth, the presiding magistrate/judge must ask the child a set of simplified question as amplified by the Court of Appeal in **Issa Salum Nabaluka v R** Criminal Appeal No. 272 of 2018, CAT; **Godfrey Wilson v R** Criminal Appeal No, 168 of 2018, CAT; and **Jafari Majani vs Republic**, Criminal Appeal 402 of 2019 (all unreported) to determine if the child is capable of comprehending the questions put to him hence a competent witness.

Since it is undisputed that the victim was 6 years when he appeared in court and testified as PW1, hence a child of tender age as per section 127(4) and his evidence ought to have been procured on oath/affirmation or upon an

undertaking to tell the truth and not to tell lies as per section 127(2). The lower court proceedings demonstrates that the trial court offended this provision. Nowhere in the proceedings did the victim promise to tell the truth. What we have in place is the re-citing by the magistrate which does suffice the requirement of section 127(2). Accordingly, I find myself constrained to disregarded and accord no weight to the testimony of the victim (PW1) for noncompliance with the law.

Having disregarded the evidence of the victim the following question is whether, the remaining evidence is capable of sustaining the conviction nd sentence. The answer to this question is regrettably in the negative because the victim's evidence was the sole evidence implicating the appellant for offence. In its absence, therefore, the prosecution's case cannot be said to have been proved to the required standards. Since the first and the third ground of appeal which I have just resolved sufficiently disposes of the appeal, I see no need to proceed further. In the foregoing, I allow the appeal, set aside the conviction and sentence and order the discharge of the appellant unless otherwise held. It is so ordered

DATED and **DELIVERED** at **MOSHI** on this 23rd January, 2023.

Recoverable Signature

X

Signed by: J.L.MASABO

J.L. MASABO
JUDGE