

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 3 OF 2022

(Arising from the decision of the District Court of Bunda at Bunda in Criminal Case No. 137 of 2019)

BETWEEN

AMANI S/O SAMBUSA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

14th & 14th June, 2023

M. L. KOMBA, J.:

Before the District Court of Bunda at Bunda, the appellant herein was arraigned with an offence of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code Cap 16 [R.E 2002]. The particulars of the offence were to the effect that on 24th day of April, 2019 at Nyasura area within Bunda District in Mara Region, the appellant had a carnal knowledge against the order of nature to one **BC** (name withheld) a boy of 8 years old.

In the bid of proving the charge against the appellant, the prosecution paraded four witnesses which are **Pendo James** (the victim's mother),

BC (the victim), **PT. 145 Inspector Majuto** and **Doctor Suleman German**. On the defence side, the appellant stood solo.

Brief fact of the case as of summarized from the prosecution evidence goes as follows; That on 24th April, 2019 around 0900hrs when the victim was on his way home from his grandmother he met with the appellant. The victim was carrying a bucket filled with burns (maandazi). The appellant called the victim and told him that he wants the burns. The victim put the bucket down and the appellant took one burn and eat it. As the victim proceeded to took on his way home, the appellant pulled him in the bush and removed the victim short and his trouser (the appellant's trouser) then he put his penis inside the victim anus (he sodomized him). After finishing that brutality act toward the victim, the appellant put on his clothes and run away.

Being in worse condition, the victim started walking to their home but on the way, he met his mother who she was on a mission of looking for him (the victim) after being worried since the victim was late home. The victim narrated the incident to his mother who helped him to the police station and then to the hospital. At the hospital the victim was examined and treated. The Doctor verified that the victim was penetrated with the blunt object in his anus (was sodomized).

Later on, the appellant was arrested and the victim identified him through identification parade conducted on Bunda Police station on 29th April, 2019. In his defence, the appellant denied the offence claiming that he was at Kihumbu village on the stated incident date.

Upon full trial, the trial court Magistrate satisfied that the prosecution has proved their case to the hilt (beyond reasonable doubt), she thus went on to convict the appellant with an offence charged and sentenced him to life imprisonment.

That trial court's decision disappointed the appellant, hence the present appeal. He lodged the present appeal containing eight (8) grounds which I did not wish to reproduce them for the reasons I will endeavour to explain later.

When the appeal was called on for hearing, the appellant appeared for himself, unrepresented connected from Musoma Prison whilst on the other hand, Ms. Natujwa Bakari, the learned State Attorney represented the respondent.

Submitting in support of his appeal, the appellant stated that the prosecution failed to take the evidence of the victim and that they used technicalities to convict and sentence him. He continued that the charge sheet was not proper as it did not have the correct provision of the law

which constitute the offence he was charged. The appellant proceeded that, the child (the victim) did not give testimony because the court did not satisfied if he understand the meaning of oath. He submitted that the court did not inquire if the victim understands the oath or if he knows the meaning of speaking truth. The appellant was of the views that, the opinion of the court on ability of the victim to testify was not recorded since there is no opinion neither dialogue between the court and witness.

The appellant submitted further that, the evidence of the doctor explained that the doctor did not find anything, there was no sperm, thus the doctor failed to prove in court that the victim was raped. He proceeded that about identification parade the law was violated when conducted. He stated that the evidence was from family members (mother and child), however the child said he does not know him but the police forced the victim to identify him.

On her part, Ms. Natujwa submitted that they conceded with appeal on the second ground of appeal that the court heard the evidence of PW2 (the victim) without considering the child promise to tell truth. Referring to section 127 (2) of the Evidence Act, Ms. Natujwa submitted that the court did not satisfy if the child can speak truth.

Ms. Natujwa proceeded that, they agreed that the trial court was errored, and if the victim evidence was expunged as directed by the Court of Appeal in several occasion, there will remain no evidence enough to convict the appellant. She then prayed this court to order retrial from when the PW2 started to give the testimony. Citing the case of **Vatehal Manji vs. Republic** (1966), EA 343 Ms. Natujwa was of the opinion that an order of retrial can depend on circumstance of each case.

Upon completion of parties' submissions, I had plenty of time to keenly pass through the submissions and the record of appeal. I find the issue which needed to be addressed with this court is whether the trial court failed to record PW2 (the victim) evidence in accordance with the law.

In their submissions, both parties agreed that the evidence of the victim who was a child of tender age was not recorded as per requirement of the law. Ms. Natujwa went further and prayed this court to order retrial from the date the victim started to adduce his evidence.

Being the child of tender age (7 years old) the victim's evidence was supposed to be recorded in a manner directed under Section 127 (2) of the Evidence Act, CAP 6 [R.E 2022] which provides as follow;

'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.'

Thus, it is plainly that, the evidence of the child of tender age may be taken without oath or affirmation, but the law requires that before adducing evidence, the child must promise the court to tell the truth and not lies. The section was couched in mandatory term which means it must be complied with.

Looking at page 2, the last paragraph of the trial court's judgment, the Magistrate stated that the PW2 (the victim) does not know the meaning of oath but he promised to tell the truth. With due respect, that statement by the trial Magistrate is contrary to what is transpired on the proceedings of the date on which the victim gave his evidence. For the purpose of clarity, I will reproduce the part of the proceedings of the trial court on 11th July, 2019 when the victim adduced his evidence as follows;

'PW: James Musa, 7 years, Nyasurura Resident, a student at Kilimani Primary School.

Question: Do you know the meaning of telling truth?

Answer: Yes, I know

Question: Do you know the meaning of telling lies?

Answer: Utaenda motoni

Question: Do you know the meaning of oath?

Answer: No

Court: This witness is credible he does understand the meaning of telling the truth but he does not understand the meaning of oath, therefore he will testify without oath.'

Therefore, as the proceedings speak for itself, there is nowhere showing that PW2 (the victim) promised the trial court to tell the truth and not lies. What evidenced is an admission of the victim that he understands the meaning of the truth and that he does not know the meaning of an oath. Thus, as have already submitted by both parties, it goes without gainsaying, that the evidence of PW2 (the victim) was attained in contravention of section 127 (2) of the Evidence Act as amended by Act No. 2 of 2016.

I am at per with Ms. Natujwa submission that PW2 evidence should be expunged as it contravenes the section of the law. But I am not spin with her prayers that the case should be ordered for retrial. In the case of **Yusuph Molo vs. Republic (Criminal Appeal No. 343 of 2017) [2019] TZCA 344 (30 September 2019)** the Court of Appeal held;

'It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution case... If there was no such undertaking, obviously the provisions of sections 127(2) of the Evidence Act (as amended) were flouted. This procedural irregularity

in our view, occasioned a miscarriage of justice. It was fatal and incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value, it is as if she never testified to the rape allegation against her...'

See also the cases of **Stephen Emmanuel vs. Republic** (Criminal Appeal No. 303 of 2019) [2022] TZCA 704 (15 November 2022) and **Hemedi Omary Ally @ Dallah vs. Republic** (Criminal Appeal No. 181 of 2018) [2020] TZCA 1846 (13 November 2020).

I therefore of the opinion that the only remedy available is to expunge the whole evidence of PW2 for contravene section 127 (2) of the Evidence Act as I hereby do. Since the other remaining prosecution evidence are not sufficient to warrant the conviction of the appellant as rightly submitted by the learned State Attorney, I allow the second ground of appeal.

From the above finding, I am of the view that there is no need to pursue and determine the other remaining grounds of appeal since my holding on the first ground of appeal suffices to dispose the appeal.

In the circumstances, for the foregoing reasons, the appellant's conviction is hereby quashed and the sentence set aside. I further order that the appellant be released from prison immediately unless he is otherwise held for other lawful course.

It is so ordered.


DATED at **MUSOMA** this 14th day of June 2023.




M. L. KOMBA
Judge

Right of Appeal is fully explained.

Judgment delivered in chamber in presence of Ms. Natujwa Bakari, the learned Stated Attorney and the appellant connected from Musoma Prison.


M. L. KOMBA
Judge
14th June, 2023