

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 171 OF 2022

(Originating from Criminal Case No. 90 of 2021 in the District Court Arusha)

ALBERT JUSTINE MUSHI @OMBENI..... APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

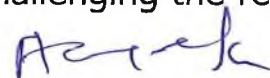
25/05/2023 & 12/06/2023

JUDGMENT

MWASEBA, J.

The appellant, one Albert Justine Mushi @Ombeni was arraigned before the District Court of Arusha and charged with an unnatural offence contrary to Section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E 2019. After full trial he was convicted and sentenced to life imprisonment.

Aggrieved and dissatisfied by both conviction and sentence he has knocked the door of this court having nine (9) grounds of appeal whereby on the first and second grounds he is challenging the reception



of the victim's evidence without conducting *voire dire* test and failure to promise to tell the truth. In the third ground of appeal, he challenges the charge sheet to be defective. In his fourth, fifth, sixth and eighth grounds he is challenging the credibility of PW1 and contradictions between the evidence of PW1 and PW2 hence the case not proved beyond reasonable doubt. In the seventh ground of appeal, he complains that the defence evidence was not considered and the ninth ground he laments that Section 214 (1) of CPA was not complied with.

During the hearing of this appeal the appellant appeared in person, unrepresented while Ms. Eunice Makala learned State Attorney appeared for the respondent. The matter was disposed of orally.

Submitting in support of the appeal, the appellant clarified his first and second grounds that the trial Magistrate erred in convicting him while she failed to lead the PW1 (victim), a child of tender age to give oath or to promise to tell the truth as per **S. 127 of TEA**. He prayed for his evidence to be expunged as it was decided in the case of **John Mkorongo James vs Republic**, Criminal Appeal No. 498 of 2020 at pages 11 – 12.



Submitting on the third ground, he averred that the charge was defective as there is a contradiction of a criminal scene. The charge sheet shows that Muriet, Msasani Street is the crime scene while witnesses said it was Kwamorombo and Msasani Primary School. Looking at the charge sheet it shows that the offence was committed at Msasani Street. But at page 9 of the proceedings the witness said he resides at Kwamorombo. Due to that evidence, it shows that the crime scene is unknown. So, **Section 234 of Criminal Procedure Act** was contravened as it stipulates that where the venue differs in the charge sheet and evidence the prosecution has to pray to substitute the charge sheet. This was not done hence he was convicted on the defective charge.

In the fourth ground of appeal, the appellant complains that the trial Magistrate erred in law to convict him while the evidence of the victim was unreliable and untrustworthy. He clarified that this witness did not tell the court how he communicated with him and what they spoke before going to the unfinished house where the offence was alleged to be committed. He referred this court to Page 8 of the proceedings in the second line where the victim said the appellant took him to the unfinished house, undressed his trouser and started to sodomize him.



He insisted that this does not come into his mind to take a child to an unfinished house and start sodomizing him without having any kind of conversation.

Submitting in support of the fifth ground of appeal, the appellant faulted the trial magistrate to convict him while PW1 and PW2 contradicted themselves in their evidence. He referred this court to page 10 of the proceedings in the seventh line which shows that PW1 was taken to the hospital and after treatment he was taken to police station. He wondered where the doctor got power to treat the victim prior to having the PF3?

In the sixth ground of appeal, the appellant averred that the trial Magistrate erred in law to convict him while there was a need to have a DNA check to prove the case. He explained that the evidence of a doctor (PW3) and exhibit P1 which is a PF3 did not prove the offence because it is not possible for a child of 8 years who had been sodomized 8 times and still his anus remained intact. He prayed that this court finds that the fabricated case come out the grudges of his mother and victim's mother because the victim's mother promised to get him lost. Thus, he was of the view that the DNA test was of paramount important.

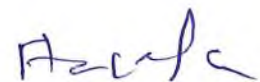


Submitting on the seventh ground of appeal, the appellant blamed the trial magistrate for not considering his defense case. So, she convicted and sentenced him in contravention of **Section 312 (1) of Criminal Procedure Act.**

Coming to the eighth ground of appeal, the appellant submitted that the case was not proved beyond reasonable doubt because the prosecution did not mention the crime scene. Further to that, PW3 (Doctor) stated that the victim's anus was intact but at the end he said it had bruises. Also, this case had no investigator and page 8 of the proceedings show that the victim did not promise the court to tell the truth.

In the ninth ground of appeal, the appellant averred that during trial there was a change of magistrate but he was not given his right on whether witnesses ought to be recalled or not. Thus, **Section 214 of Criminal Procedure Act** was contravened.

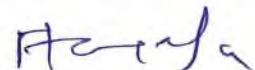
Responding to the appeal, Ms. Makala learned State Attorney supported the appeal regarding the first and second ground of appeal and argued them jointly. She said the appellant stated that the trial court contravened **Section 127 (2) of Tanzania Evidence Act, Cap 6 R.E**



2022. This provision states that a child of tender age has to tender evidence on oath or he has to promise to tell the truth. Ms. Makala referred this court to page 7 – 8 of the proceedings where it is shown that the magistrate asked questions to the victim. Then he started to record his evidence. The record does not show that the child victim promised to tell the truth. Failure for a child to promise to tell the truth his evidence is not of evidential value as per **Section 127 (2) of Tanzania Evidence Act.**

She referred this court to the case of **Jackson Antony vs Republic**, Criminal Appeal No. 242 of 2019 in which the Court of Appeal met with the same scenario. The court stated that a child of tender age did not promise to tell the truth and his evidence which was taken in contravention of **Section 127 (2) of Tanzania Evidence Act** was of no value. By saying so, the first and second ground has merit as the evidence of PW1 was received contrary to the above provision.

Regarding the third, fourth and eighth grounds which the appellant stated that the prosecution failed to prove the case beyond reasonable doubt, it was the submission of Ms. Makala that the appellant was charged and convicted of unnatural offence **C/s 154 (1) of Penal Code**. To prove this offence there must be a proof that there was



penetration as it was stated in the case of **Joel Ngailo vs Republic**, Criminal Appeal No. 344 of 2017. She averred that in the above-mentioned case the Court of Appeal stated that to prove the unnatural offence there must be a proof of penetration. Looking at the evidence of victim which is of no any evidential value it is difficult to prove who sodomized him and as to whether he was sodomized as his evidence is of no evidential value. So, long as the evidence of PW1 is of no evidential value there is no any other evidence which can prove the commission of this offence as the doctor cannot prove who committed this offence. So, we find that this offence was not proved beyond reasonable doubt.

Ms. Makala further submitted that they did not prove the case due to variances of charge sheet and the evidence. The charge sheet shows the offence was committed at Msasani Street at Muriyet District while the evidence shows the offence was committed at Kwamorombo Street, this makes the charge sheet to be defective and cannot be cured by **Section 388 of Criminal Procedure Act**. So, she was of the view that this ground has merit to allow the appeal.

Replying to the seventh ground of appeal in which the appellant said his evidence was not considered by the trial court, Ms. Makala was in



consensus that looking at the trial court judgment, the defense evidence was not considered. She however said that the omission cannot deprive the appellant's right as this court has the power to evaluate the defense case and came to its own findings.

In the last ground which the appellant complained that there was contravention of **Section 214 of Criminal Procedure Act** Ms. Makala argued that the provision was well complied with as hon. Meena gave the reason for taking over the matter after hon. Chitanda had been transferred to another duty station. Further to that, at page 15 of the proceedings the appellant agreed to proceed with the hearing of the case after being given the reason for the re-assignment. So, she prayed that this appeal be allowed due to the first, second and eighth grounds of appeal.

After having the submissions from both sides and going through the record the main issue for determination is whether the appeal before me has merit or not.

Starting with the first and second grounds of appeal, the appellant has complained that the trial court contravened the provision of **Section 127 (2) of Tanzania Evidence Act** by not leading the child victim to



promise to tell the truth or rather to give oath. This has been agreed by the learned state attorney who asked this court to expunge the evidence of the victim. I have perused the record and found that the trial magistrate led the child victim to questions to ascertain if he understands the meaning of oath and the importance of speaking the truth. Then he concluded that the witness seems to know the meaning of telling the truth. The child never stated that he promises to tell the truth. In the case of **Jackson Antony vs Republic** (supra) which was cited by the learned state attorney, the Court of Appeal settled that the evidence of a child whose evidence was taken in contravention of **Section 127 (2) of Tanzania Evidence Act** is of no evidential value. Therefore, I align myself to the above position and expunge the evidence of the victim. Thus, the first and second grounds of appeal have merit.

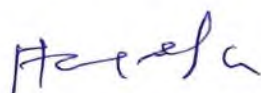
Coming to the third, fourth and eighth grounds the appellant stated that the prosecution failed to prove the case beyond reasonable doubt. The appellant was charged and convicted of unnatural offence **C/s 154 (1) of Penal Code**. To prove this offence there must be a proof that there was penetration as it was stated in the case of **Joel Ngailo vs Republic (supra)**. In the absence of the evidence of the victim (PW1),



we remain with the evidence of PW2 (victim's mother) who gave hearsay evidence and her evidence cannot prove penetration. More to that, she can not prove the person who sodomised the child because she was not present at the crime scene. The evidence of PW3 who is a doctor was to the effect that the victim's anus had bruises but was intact. I agree with the learned state attorney that the evidence of a doctor cannot prove as to who committed the offence.

In addition to that, the parties herein are in consensus that the case was not proved due to variances of chargesheet and evidence. The chargesheet shows that the offence was committed at Msasani Street at Muriet District while the evidence shows the offence was committed at Kwamrombo street so the charge sheet is defective and cannot be cured by **Section 388 of Criminal Procedure Act**. So, the third, fourth and eighth grounds have merit too.

The first, second, third, fourth and eighth grounds of appeal are enough to dispose of the appeal as the case has not been proved to the required standard. Therefore, there is no need to discuss the remaining grounds of appeal.



Based on the preceding reasons, I find that the appeal has merit. The conviction and sentence meted by the trial court are hereby quashed and set aside. The appellant should be set at liberty unless otherwise he is lawfully held.

It is so ordered.

DATED at **ARUSHA** this 12th day of June, 2023.



N.R. Mwaseba
N.R. MWASEBA

JUDGE