IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 22 OF 2023

(Originating from the District Court of Arusha at Arusha, Criminal Case No. 12 of 2022)

PAULO MERIKIOLI @ VICENT.....APPELLANT

VERSUS

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

JUDGMENT

08/06/2023 & 13/07/2023

MWASEBA, J.

The appellant, Paulo Merikioli @ Vicent was charged with, and convicted of Unnatural Offence Contrary to **Section 154 (1) (a) and (2) of the Penal Code**, Cap. 16 R.E 2019 in the District Court of Arusha at Arusha.

The facts of the case were unveiled by the prosecution that, on 29th day of November, 2021 at Sokoni One area within the City, District and Region of Arusha, the appellant did have carnal knowledge of a young boy aged six (6) years against the order of nature. The young boy will be referred to as the victim or PW2 to hide his identity.

The appellant denied to have committed the alleged offence and stated that he was arrested on the claim of theft of mobile phone and became aware of this offence after being arraigned in court.

At the hearing of the case before the trial court, the prosecution case was constructed on the testimonies of four (4) witnesses with three (3) exhibits while the defence case was concluded by one witness with no exhibit. After the trial Magistrate being satisfied that the prosecution evidence weighed more than defence, he convicted the appellant and sentenced him to mandatory sentence of life imprisonment.

In pursuit of his innocence, the appellant lodged the present appeal to this court stating five (5) grounds of appeal as depicted in the memorandum of appeal.

When this matter came up for hearing, the appellant appeared in person, unrepresented while the respondent, Republic enjoyed the legal service of Ms. Eunice Makala, Learned State Attorney. The matter was disposed of orally.

Supporting the appeal on the first and second grounds of appeal, the appellant complained that the charge was not proved beyond reasonable doubt as the age of the victim was not properly proved. He averred that a charge sheet shows that the age of the victim was 6 years of age while

the victim stated he was five (5) years. Even the victim's mother did not state the age of the victim. He asserted that the Court of Appeal in different cases has stated that the age of the child victim must be proved beyond reasonable doubt. He supported his argument with the case of **Anold Loishie @ Leshai vs Republic**, Criminal Appeal No. 249 of 2017 (CAT-Unreported).

Replying to these grounds, Ms. Makala submitted that a charge was proved beyond reasonable doubt. She contended further that as the appellant was charged with unnatural offence, the prosecution was supposed to prove penetration and the age of the victim. The ingredient of penetration was proved by PW2 (the victim) who stated that the appellant inserted his penis to his anus and he felt pain. Furthermore, PW3 (the doctor) stated that when he examined the victim, he saw bruises at his anus with loose sphincter. Regarding the age of the victim, Ms. Makala submitted that the victim's age was proved by PW1 (the victim's mother) who tendered a clinic card of the victim which was admitted as exhibit P1. Thus, these grounds have no merit.

On the third ground of appeal, the appellant complained that the evidence of the victim was taken contrary to **Section 127 (2) of the Evidence Act**, Cap 6 R.E 2022. He averred that the victim did not promise to tell

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the truth as no questions were put to him to see if he understands the meaning of telling the truth. He referred this court to the case of **John Korogo James vs Republic**, Criminal Appeal No. 498 of 2020 (CAT-Unreported) to support his arguments.

Opposing this ground, Ms. Makala submitted that **Section 127 (2)** of Cap 6 R.E 2022 was complied with. She submitted further that although no questions were recorded but the same was asked to the victim who promised to tell the truth. She cemented her argument with the case of **Wambura Kiginga vs Republic**, Criminal Appeal No. 301 of 2018.

Submitting on the fifth ground of appeal, the appellant complained that it was wrong for the trial court to rely on a caution statement which was taken contrary to **Section 51 of the Criminal procedure Act**, Cap 20 R.E 2019. He argued further that the caution statement did not reveal the time he was arrested it just indicated the date when he was interrogated which is 16/12/2021. He prayed for the caution statement to be expunged from record. He supported his argument with the case of **Anold Loishie @ Leshai vs Republic** (Supra).

Ms. Makala supported this ground that the caution statement was taken out of time and so she admitted for the same to be expunged from the record. However, she said the evidence of the victim will prevail as he

stated that he was sodomised and his evidence was supported by the evidence of the doctor. Her arguments were supported with the case of **Selemani Makumba vs Republic**, (2006) TLR No. 384 in which the court settled that good evidence in sexual cases comes from the victim himself.

It was the appellant's further submission on the sixth ground of appeal that the prosecution failed to bring material witnesses such as neighbours who allegedly helped to catch the victim and the Street Chairman whom the matter was firstly reported. So, he prayed to be benefited from that doubt.

Contesting this ground, Ms. Makala submitted that no particular number of witnesses is required to prove a case as per **Section 143 of Tanzania Evidence Act.** The case cannot flop because no neighbours were brought to testify as they never witnessed the commission of the offence.

On the seventh ground of appeal, the appellant complained that the prosecution evidence was marred with contradictions. He averred that PW1 told the court that on 29/11/2021 at 19:00 hrs she was looking for her child (PW2) and found her at the shop crying. When the child victim saw her, he started to run away; they ran after him and when they caught him, he said "Paulo amenifanyia kitu kibaya." On the other hand, PW2

told the court that after the incident he went back home and asked for forgiveness to his mother on what happened. He submitted further that, PW1 claimed that after reaching at the hospital, she lost consciousness in front of the doctor but the doctor did not say anything about that.

Opposing this ground, Ms. Makala submitted that the alleged contradictions between PW1 and PW2 were just minor and it did not go to the root of the case. She submitted further that minor contradictions between the witnesses are a normal thing in cases. Her argument was supported with the case of **Emmanuel Lyabonga vs Republic**, Criminal Appeal No. 257 of 2019.

On the last ground of appeal, the appellant complained that the evidence was not properly evaluated as it was weak and did not prove the charge against him. Thus, he prayed for the appeal to be allowed so that he may be set free.

Opposing this ground, Ms Makala stated that the trial magistrate evaluated the evidence from both parties, so, this ground has no merit. She prayed for the appeal to be dismissed for want of merit.

I have carefully examined the grounds of appeal, the trial court record

and the oral arguments from both sides. The pertinent issue to be determined by this court is whether the appeal has merit or not.

I wish to start with the first, third and fifth grounds of appeal where the appellant complained that a charge was not proved beyond reasonable doubt as the evidence of PW2 was taken contrary to **Section 127 (2)** of Cap 6 R.E 2019 and his caution statement was also taken contrary to **Section 50 and 51 of the CPA**.

Starting with the complaints that the evidence of PW2 (child) was taken contrary to **Section 127 (2)** of Cap 6 R.E 2019, the provision provides that:

> *"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."*

The above provision is simply interpreted that a child of tender age may give evidence after taking oath or making affirmation or after promising to tell the truth and not lies. The compliance of this provision was well explained in the case of **Godfrey Wilson vs Republic**, Criminal Appeal No. 168 of 2018 (CAT-Unreported) that:

> *"We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions/ which may not be*

exhaustive depending on the circumstances of the case as follows:

1. The age of the child.

2. The religion which the child professes and whether he/she understands the nature of oath.

3. Whether or not the child promises to tell the truth and not to tell lies."

See also the case of **Issa Salum Nambaluka vs The Republic**, Criminal Appeal No. 272 of 2018 (CAT-Unreported).

In our current case, at page 10 of the typed proceedings the trial magistrate recorded that:

"**Court:** *Because PW2 is an infant child, this court has the duty to warn itself if he understands the duty of speaking the truth and consequences of speaking lies. The court has satisfied that PW2 understands the consequences of speaking lies and had promised to speak the truth.*"

The record is silence as to whether the child was asked any questions by the court prior to giving his evidence. Nothing shows that a child responded to the questions or promised to tell the truth. Basing on the above cited cases, it is settled that before the child of tender age gives his evidence, a trial court should at first, ask few pertinent questions so as to determine whether or not the child witness understands the nature

of oath as it was stated in the case of **Godfrey Wilson vs Republic (Supra)**. He records in the case at hand show that the trial magistrate concluded by himself that the child understands the consequences of speaking lies and has promised to tell the truth. As alluded herein, I agree with the appellant that in this case, the procedure used to take PW1's evidence contravened the provisions of **Section 127 (2)** of the Evidence Act. Thus, I allow the third ground of appeal and the evidence of PW2 is hereby expunged from the record.

Regarding the caution statement (Exhibit P3), it was the complaint of the appellant that the same was taken contrary to **Section 50 and 51 (1) (a) of the Criminal procedure Act**, Cap 20 R.E 2019. He alleged further that he was arrested on 06/11/2021 but the caution statement shows only the date he was interrogated. It did not reveal the date he was arrested. The Section 50 of the CPA provides that:

> *"For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*

Subsection (b) of Section 50 (1) of the CPA provides further that:

> *"If the basic period available for interviewing the person is extended under section 51, the basic period as so extended."*

In our present appeal, the trial court records reveal that the appellant was arrested soon after the commission of the offence but his statement was taken on 16th day of December, 2021 two weeks later without adducing any reasons for being late to interrogate the accused person. The same was held in the case of **Roland Thomas @ Mwangamba vs Republic**, Criminal Appeal No. 308 of 2007 (CAT-Unreported) that:

> *"There is no proof in the present case that the period for interviewing the appellant beyond the period provided under Section 50 was ever lawful extended as by law provided. This court has stated in a number of decisions that a statement recorded in contravention of Section 50 of the CPA is admissible."*

See also the case of **Junta Hoseph Komba and 3 Others vs Republic**, Criminal Appeal No. 95 of 2006 (CAT-Unreported).

Guided by the cited authority, this court agree with the appellant and the learned state attorney that the caution statement was taken contrary to **Section 50 and 51** of the CPA and the same is hereby expunged from the records.

Thus, having expunged the evidence of PW2 (the victim) and the caution statement of the appellant (Exhibit P3) in which it was alleged that the appellant admitted to have committed the offence, the remaining evidence is that of PW1 (the victim's mother) and PW3 (the doctor). On his side, PW3 only proved that after examination he found the victim was penetrated in his anus with a blunt object but he is not aware as to who penetrated the victim. For those reasons, this court remain with the evidence of PW1 who stated that it was PW2 (the victim) who told her that he was sodomised by the appellant herein and the same cannot stand on its own without collaboration as it was just and hearsay evidence and she did not witness the commission of the offence. This position was well settled in the case of **Vumi Liapenda Mushi vs The Republic**, Criminal Appeal No. 327 of 2016 (CAT- Unreported) where it was held that:

> *"It is evident from the record that PW1, PW2, PW4 and PW5 did not witness the incident. Their evidence was indeed hearsay. Hearsay evidence is of no evidential value. The same must be discredited."*

Thus, being guided by the cited authority, I find that the evidence of PW2 is of no evidential value as it is hearsay evidence. More to that the evidence of PW3 does not implicate the appellant to be the culprit who committed this offence.

Thus, based on the evidence alluded herein, this court is of the firm view that the prosecution failed to discharge its duty of proving the case beyond reasonable doubt. Hence, the first, third and fifth grounds of appeal are found with merit. So long as these grounds dispose of the whole appeal, there is no need to determine the remaining grounds of appeal.

For those reasons, I allow the appeal, quash the conviction and set aside the sentence imposed to the appellant. Accordingly, I order that the appellant be set at liberty unless he is held for some other lawful cause.

It is so ordered.

DATED at **ARUSHA** this 13th day of July 2023.

N.R. MWASEBA

JUDGE