IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 51 OF 2022

(Originating from Decision of Moshi District Court at Moshi in Criminal Case No. 322 of 2022 dated 12th day of September, 2022)

DICKSON ELIA NJAU @ BABUU SALUU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

8th June & 25th July 2023

A.P.KILIMI, J.:

The appellant one DICKSON ELIA NJAU@ BABUU SALUU was arraigned at Moshi District Court in Criminal Case no. 322 of 2022 for the offence of unnatural offence c/s 154(1) (a) (b) and (2) of the Penal Code [Cap 16 RE 2019]. The particulars of this offence alleges by the Prosecution were to the effect that on 7th September, 2022 at KDC Mbokumu area, within Moshi District and Kilimanjaro Region, the appellant did have carnal knowledge of "**YB**" (in pseudonym) a boy aged 7 years old against the order of nature.

The appellant pleaded not guilty to the charge. But on 12/9/2022 when the case appeared for Preliminary hearing, according to the trial court he admitted the facts, and consequently the said court find him guilty for the offence charged above and proceed to convict him and having considered the aged of the victim sentenced him to serve life imprisonment.

The appellant aggrieved by said conviction and sentence has knocked the door of this court armed with the following grounds;

1. That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the Appellant basing on an Equivocal plea of guilty.
2. That, the learned trial Magistrate grossly erred both in law and fact in failing to take into consideration that upon the admitted facts by the Appellant still the plea was imperfect, ambiguous or unfinished, therefore the trial Magistrate erred in treating it as a plea of guilty.
3. That, the learned trial magistrate grossly erred both in law and fact in failing to note that, upon the admitted facts, the Appellant could not in law have been convicted of the offence charged.
4. That, the learned trial Magistrate grossly erred in both law and fact in failing to note that, the appellant was not deserved to be convicted upon an equivocal plea of guilty since he pleaded not guilty to the charge laid before his door.
5. That, the Learned trial Magistrate grossly erred both in law and fact in convicting he Appellant basing on a fabricated and concocted proceedings since in the

memorandum of what the trial magistrate termed as undisputed facts, he listed things which were never at all stated by the Appellant.

6. That, the trial court convicted the Appellant on an irregular proceedings since the PP produced and tendered in evidence the prosecution exhibits. Yet the duty of the PP is to prosecute, in tendering the exhibits he was assuming the role of a witness and he was not a sort of a witness who could be capable of being cross - examined upon oath or affirmation.
7. That, the trial Magistrate grossly erred both in law and fact in failing to note that, exhibit PI (extra Judicial statement) and exhibit P2 (the Pf3) were not read out aloud before the court. Therefore, the Appellant's attention was not drawn to the contents of the alleged exhibits.
8. That, the Learned trial Magistrate grossly erred both in law and fact in failing to consider that, the outline facts even though admitted by the accused person (now the Appellant) to be true, do not show the constituents of the offence of unnatural offence, rather they merely raise a suspicion and it is a trite law that suspicion however grave cannot be the basis of a conviction in a criminal charge.
9. That, the Learned Trial Magistrate grossly erred both in law and fact when she failed to adapt the opinion expressed by the court of appeal for Eastern Africa in the case of **IBRAHIM BINSALEHE V.** R, **1 TLR 641** that it is not desirable to record a plea of guilty in a capital charge.

When this appeal came before me for hearing, the appellant who stood himself, prayed to argue this appeal by way of written submission, the same was not objected by Ms. Mary Lucas learned Senior State Attorney. I applaud both for timely compliance of the schedule ordered.

In the appellant submission argued general without mentioning in which of the above grounds is arguing for. The appellant started by submitting that, the learned trial Magistrate erred in law in convicting the Appellant basing on an equivocal plea of guilty. In the preliminary hearing under section 192 (3) of the C.P.A, Cap 20 R.E 2019. He was astonished when the trial Magistrate was preparing what she described as memorandum of undisputed facts, she listed things which were neither stated nor agreed by the appellant. He also said It is not true that he has committed the charged offence, since, if it could have had been true that he has committed the said offence, he could have pleaded guilty to the charge after being read over to him, in the first instance.

The appellant further submitted that, even taking into consideration that upon the admitted facts by the Appellant still the plea was imperfect, ambiguous and unfinished, hence the trial Magistrate erred both in law in treating the same as the plea of guilty. This is because the facts narrated did not constitute the offence of unnatural offence. Thus, appellant did not know the charge, to buttress this he referred the case of **David K. Gath vs. The Republic,** Criminal Appeal no. 118 of 1972.

In respect to the exhibits tendered, the appellant contended that was accorded with an unfair trial, since the Public Prosecution (PP) produced and tendered in evidence the exhibits (PI and P2), in tendering the said exhibits the PP was assuming the role of a witness who could not be capable of being cross-examined upon oath or affirmation. Moreover, the said document never read out aloud before the court and to the Appellant after being admitted in evidence as exhibits. Therefore, prayed the same be expunged from the record.

The appellant further submitted that one of the main ingredients among others in proving the offence of this nature particularly in determining the sentence to be imposed against the Appellant is the "age of the Victim" when you take a close observation on what the trial court termed as "memorandum of undisputed facts" no anywhere the Appellant agreed that the victim of the alleged offence had seven (07) years old as displayed on the charge sheet and as indicated in the facts read over to the Appellant. Therefore, the act of the Learned trial Magistrate to invoke section 154 (2) in sentencing the Appellant was a serious misdirection in law which resulted to the miscarriage of justice against the Appellant.

In concluding the appellant submitted that the appellant had prior to the conducted preliminary hearing already entered a plea of not guilty, and taking into consideration that a charge has always been a foundation in any criminal trial, therefore, for the appellant's plea of not guilty to the charge, the trial court was supposed to go to a full trial not withstanding an ambiguous fact allegedly admitted by the Appellant. Also taking regard the offence charged is serious one which attracts a harsh and severe sentence (life sentence) therefore the trial court in acting on an equivocal plea given by that Appellant was a serious injustice against the Appellant. To fortify his position, he has referred the case of **Ibrahim Bin Salehe V. R,** 1 TLR 641.

In replying the above grounds, I have perused the respondent submission signed by Ms. Mwahija M. Ahmed learned Principal State Attorney, she started in respect to ground one by contending that, the conviction and sentence awarded to appellant was grounded from the PH proceedings as technically conducted by the trial magistrate, that was actually transpired in the trial court and it should not be easily impeached, she supports this by referring me the case of **Halfani Sudi vs. Abieza Chichili** [1998] TLR 527 .

The learned Principal State Attorney submitted that is pertinent to look at the court record and put under scrutiny the legal position that governing the conduct of Preliminary Hearing (PH) when the accused pleads not guilty to the charge and admit all the facts that constitutes the offence charged. She then said according to **Ndaiyai Petro vs. Republic** Crim. Appl. No. 277 of 2012 (unreported) it was propounded that a PH is conducted where an accused person pleads not guilty and the purpose is to ascertain what is not in dispute so as to minimize the cost of calling witnesses not required. Moreover, she submitted that in the case of **Masanja Misalaba vs. The Republic** Crim. Appl. 363 of 2016 (unreported) it was held that during the PH facts read over are part and parcel of the evidence and in term of section 192 of the CPA once admitted, they are taken to be proved beyond reasonable doubt by the prosecution side, so long as the appellant was given an opportunity to dispute or to admit facts. Therefore, there is no legal justification for trial court to seek for more evidence from prosecution side.

Ms. Mwahija further contended that, in the case of **Issa Ramadhan vs. The Republic** Crim. Appl. No.4 of 2017 (unreported) it was held that, if the accused does not deny the alleged facts in any material respect, the

magistrate should record a conviction and proceed to hear any further facts relevant to sentence. Therefore, she based on all above cases cited, to urge this court that, the admission by the appellant is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution side.

Replying to the ground number two, three, four, and eight, the learned Principal counsel for Respondent submitted that are baseless, due to the reason that the facts read to the appellant constituted unnatural offence and he admitted them all without reservation. She also contended the fact that the victim was taken to Majengo Medical Centre where he was examined and discovered to have slightly penetrated. In respondent view, his version that "I tried to insert my penis but failed" is a very proof of "slight penetration" as discovered at Majengo Health Centre.

Arguing for ground number five, she contended that, in respondent's view, the trial magistrate reproduced only replies that are essential elements of unnatural offence despite the fact that the appellant admitted to all facts as read to him during PH. However, the trial magistrate did not find any undisputed facts from the reply of the appellant, and that is why he recorded nothing to that effect. She further added that such can be

taken as an irregularity which is a minor procedural irregularity which did not prejudiced the appellant anyhow, and curable under section 388 of the CPA.

In replying to ground number six, seven and nine, she submitted that, the respondent concede and avers during PH the record shows it was the Public Prosecutor who tendered exhibits. But, there's no strict rule of procedure that prohibit Public Prosecutor to tender documentary exhibits for admission during PH. However, as they were not read after its admission, they deserve to be expunged from the record of proceeding. Nonetheless, the facts adduced by prosecution sufficiently established the offence charge without the admission of the impugned documentary evidence. The learned Principal State Attorney concluded that this was one of the straight forward case justifies the Appellant's conviction and sentenced as per the record of proceedings suggests, therefore prayed the appeal be dismissed in its entirety.

I have considered the rival submission submitted above, I find it is important to highlight the law upon which the appellant was convicted with, according to the Penal code Cap. 16 R.E. 2019, the offence charged is provided under section 154 which provides that;

"154.-(1) Any person who-

(a) ***has carnal knowledge of any person against the order of nature****; or*

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature,

commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."

[Emphasis supplied]

I mindful that in order to prove the case of unnatural offence, the prosecution must prove that:- **one**, The accused had carnal knowledge to the victim against the order of nature and **two**, there was penetration however slight it might have been. These are crucial elements in this offence.

Moreover "carnal knowledge" is a phrase derived from latin words "scientia carnalis" or "cognitio carnalis." These phrases were then translated to "carnal knowledge" or "knowledge of the flesh" in English. In Latin,

"scientia" refers to knowledge or understanding, while "carnalis" or "cognitio" pertains to matters of the flesh or physical desires.

However, what amount to carnal knowledge was stated in our jurisdiction by the case of Paul **Dioniz vs. Republic** Criminal Appeal No. 171 of 2018 CAT at Dsm where the court observed that the term "carnal knowledge" used in the particulars of offence simply means "sexual intercourse". Also the same is defined In **Blacks' Law Dictionary** Eighth Edition Bryan A. Garner at page 226, to mean "sexual intercourse especially with an underage female".

I wish also to make deductive approach from the provision of rape which is kindred offence to the offence of unnatural offence, section 130 (4) (a) of the Penal Code, stipulates categorically that penetration is one of the essential ingredients of rape thus-

> *"130 (4) For the purposes of proving the offence of rape-*
> *(a)* ***penetration however slight*** *is sufficient to constitute the sexual intercourse necessary to the offence*
>
> (Emphasis is added)

Reading the section 154 of the Penal Code cited above, it is obvious that in proving unnatural offence, evidence establishing penetration of the male's manhood into another person anus is necessary and such penetration, however slight is sufficient to constitute sexual intercourse.

In the case at the trial court, it is alleged that the appellant confessed the offence created by the provision above. It a trite law and practice that in order one to be convicted by his own plea of guilty, he or she must confess or admit all facts constituting the offence charge, in other words he or she must admit to all ingredients of the offence, therefore it is the duty of the prosecution to narrate to him all those ingredients above. These conditions for statement of accused person to be termed as confession is provided under section 3 of The Evidence Act Cap. 6. R.E. 2022 and for easy reference I reproduce hereunder;

> *"**3.**-(1) In this Act, unless context otherwise requires - "confession" means-*
> *(a) words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence;*

(b) a statement which admits in terms either an offence or substantially that the person making the statement has committed an offence;

(c) a statement containing an admission of all the ingredients of the offence with which its maker is charged; or

(d) a statement containing affirmative declarations in which incriminating facts are admitted from which, when taken alone or in conjunction with the other facts proved, an inference may reasonably be drawn that the person making the statement has committed an offence;"

According to grounds raised by the appellant, ground number 1,2,3,4 and 8 both in essence pledged that the appellant was convicted by equivocal plea of guilty, which in my view is a crux point in this appeal.

I have entirely scanned the facts narrated to the appellant at the trial court, I am settled that the facts constituted the offence charged. But I have the problems with the facts admitted by appellant, I have asked myself whether they amounted to confession within the law I have referred above.

According to page 4 of the typed proceeding of the trial court, the trial court wrote reply of the appellant as follows;

"Accused's Reply

- It is true that the victim entered in my house

- It is true that I applied oil in his anus

- It is true that I placed my penis onto the victim's anus

- It is true that I tried to insert my penis into the victim's anus

- It is true that the victim wore his clothes and left

- It is true that the victim was found with oil in his anus

- It is true that the victim and street leaders came to my house

- It is true that I was arrested

- It is true that I confessed to the police that I only placed my penis into the victim's anus

- It is true that I was taken to the Justice of Peace

- It is true that I explained that I tried to insert my penis but failed

- It is true that the victim was taken to Majengo Health Center.

- The rest of the facts are not true"

[Emphasis supplied]

After the appellant replied as shown above, then then the trial magistrate proceeded to compose undisputed facts as hereunder;

"MEMORANDUM OF THE UN-DISPUTED FACTS

1. It is settled to the accused's personal particulars

2. It is settled that the victim appeared to the accused's house

3. It is settled that the accused person applied oil to the victim's anus.

4. It is settled that the accused person placed his penis to the victim's anus.

5. It is settled that the accused person confessed that he placed his penis to the victim's anus

6. It is settled that the accused person tried to insert his penis but failed"

[Emphasis supplied]

In my view, the fact that the appellant said that **"It is true that I explained that I tried to insert my penis but failed"** is an exculpatory statement, also to my view this craws back all what he has stated above. Nonetheless, in my opinion cannot be equated as slightly penetration as tried to be submitted by the learned Principal State Attorney, this is because the demarcation or proximity cannot be inferred through that statement said above, that there was slightly penetration, rather it is rebuttable presumption, therefore not ascertained. I think the situation could have been cleared after hearing evidence.

To explain more, an exculpatory statement is a statement made by an individual that tends to clear themselves or absolve themselves of guilt

or responsibility for a particular act or wrongdoing. It is a statement that presents a defense or justification for one's actions.

Principally it is trite, a statement in which a person exculpates himself from the offence is not a confession. In the book **Law of Evidence** by Sudipto Sakar & V.R Manohar, Vol.I, Lexis Nexis at page 602, the learned authors state as follows:

> *"No statement that contains **seif-exculpatory matter can amount to a confession,** if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence."*
>
> [Emphasis supplied]

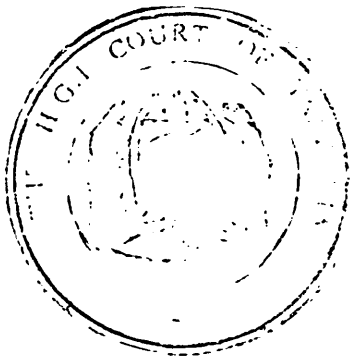
With the foregoing endeavors and the findings which I have made. I am unable to agree with The Learned Principal State Attorney, that the appellant's statement amounts to a confession. Therefore, it is my conclusion that the appellant did not confess absolutely to the offence charged, because his plea remained equivocal.

Since, at the trial during PH when accused reminded the charge pleaded not guilty as it was in the first arraignment. For the sake of justice for both parties, I find appropriate this is the fit case to be heard in merit. Under the above circumstances, I allow the appeal, quash the conviction and set aside the sentence and any order imposed against the appellant. Also, the proceeding of PH conducted is hereby quashed.

Consequently, I order the case file be remitted to the trial court, for conducting Preliminary Hearing afresh. Meanwhile the appellant be detained in police custody pending this proceeding at the trial court, and upon reach the trial court will be subject to bail conditions at the discretion of the trial court.

Order accordingly.

DATED at MOSHI this 25th day of July 2023.



A. P. KILIMI

JUDGE