IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 33 of 2022

(Originating from Criminal Case No. 186/2020 Shinyanga District Court at Shinyanga)

EDWARD CHARLES @EDU .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

10th July & 18th July 2023

F.H. MAHIMBALI, J

In the District Court of Shinyanga, the appellant stood charged for the offence of committing unnatural offence contrary to section 154 (1) (a) of the Penal code, Cap. 16 R.E. 2019.

It was alleged that the appellant in on diverse dates between 11 April to 14th October 2020 at Ndembezi areas within Shinyanga Municipality region did have carnal knowledge of one Joseph S/O Juma @ Kahanya against his order of nature.

The prosecution brought four witnesses and tendered one exhibit (PF3) to prove the charges against the appellant.

After the full trial, the trial court found him guilty and sentenced him to suffer life imprisonment.

The appellant was aggrieved with the conviction and sentence hence this appeal with five grounds whose major complaint is to the effect that the prosecution had weak evidence to warrant his conviction and sentence because the prosecution case was hypothetical, the voire dire test was not conducted and thus there was procedural irregularity in admitting exhibits.

At the hearing of this appeal, the appellant was present in person while the respondent enjoyed the service of Mboneke Ndimubenya, learned State Attorney.

The appellant arguing his appeal adopted his grounds and prayed that his appeal be allowed.

Ms. Mboneke resisted all grounds of appeal by the appellant and submitted that the appeal is without merit.

Ms. Mboneke submitted that; the prosecution case was proved beyond reasonable doubts. She further added that, the offence which the appellant was charged to, requires three elements to be established; penetration, age of the victim and doer of the wrong.

Ms. Mboneke also averred that, with sexual offence the best evidence comes from the victim herself or himself, unless otherwise, it is incriminating by itself.

In the case at hand, PW1 clearly stated how the appellant went against his order of nature. Therefore, the evidence covers the principles stated by the Court of Appeal in the case of **Selemani Makumba**.

Ms. Mboneke also added that the PW1, stated all the facts about the incidence which incriminate the appellant with the offence. Such evidence was supported by the evidence of PW4 the medical doctor, who examined the said victim and identified that the victim was known carnally against the order of his nature. PW1 also testified the same to one called Kuwa and later to his father.

Further it was undisputed that the age of the victim was 10 years. Since the issue of age was stated by the victim himself, it could as well in law be established by his parent, guardian and medical doctor.

Ms. Mboneke further submitted that, the requirement under Section 127 (2) of The Evidence Act, clearly provides that a child of tender age once gives his testimony, he is required to promise that he will tell nothing but the truth. The condition precedent before the child of tender age can

give evidence, must establish that he/she knows the nature or meaning of oath, otherwise is charged to promise to tell the truth. She contended that at page 15 of the typed proceedings, the victim was recorded to have said that he did not know the meaning of oath. However, he promised to tell the truth before the Court. On this, she referred this Court to the case of ***Kazimili Samweli Vs. Republic, Criminal Appeal No.57 of 2016***. (CAT).

Ms. Mboneke further argued that, since the evidence of PW1 is supported by the evidence of other witnesses, therefore the prosecution evidence on that aspect was in compliance with the requirements of the law. She the pressed for dismissal of the appeal.

In rejoinder the appellant reiterated what he submitted in chief and pressed for his release. After I have heard both parties to the case, I have now to determine the appeal and the issue to be determined is whether this appeal has been brought with sufficient cause.

I have gone through the petition of appeal, records of the trial Court and submission by both parties. And therefore, I have to determine the appeal and the major issue to be determine is whether this appeal has been brought with sufficient cause.

First, I should begin, by saying that the victim of age was proved in the case at, this is established by the evidence of PW1, PW3 (parent) and the PW4 (doctor). The same was not disputed during the trial. I therefore entirely agree with argument by Ms. Mboneke that the age of the victim was proved.

However, in the course of reading the trial Court records, I found that Section 127 of the Evidence Act Cap 6 RE 2022 was not complied with.

In terms of section 127 (4) of the Evidence Act supra, PW1 is a child of tender age as he was alleged to be of 11 years old. A witness of tender age like any other witness in a criminal trial must as a general rule give his or her evidence under oath or affirmation as it is mandated under section 198 (1) of the Criminal Procedure Act, Cap 20 R.E 2022 which reads;

> *"Every witness in a Criminal Cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the oath and statutory Declarations Act"*

The child of tender age unlike an adult witness must however, before giving evidence under oath or affirmation be tested by simplified questions and the trial Court be satisfied that such witness can in fact give evidence under oath or affirmation as the case may be. ***See the case of Selemani Moses Sotel @ White versus the Republic, Criminal Appeal No. 385 of 2018*** (CAT). However, when the Court examines the witness as such and becomes satisfied that a child witness can only give evidence without oath or affirmation, it is when it resorts into the exemption of section 198 (1) of the CPA (supra).

The exemption is as provided under section 127 (2) of the Evidence Act (supra) in which the evidence will be taken without oath or affirmation subject to the witness promising to the Court that she/he will tell nothing but only the truth and undertake not to tell lies.

The records must however be clear as to how the Court arrived into such a conclusion that a certain child witness should give evidence under oath or affirmation or should give evidence without oath or affirmation under the exemption.

The evidence taken contrary to the said requirements of the law becomes valueless and cannot be acted upon to convict as it was decided in the case of ***Godfrey Wilson versus Republic, Criminal appeal no.***

168 of 2018 (CAT). The Court of Appeal of Tanzania as well as this Court have in several occasions insisted that trial Courts should not rush into requiring the child witness to promise telling the truth and not lies without first examining him/her whether he/she understands the nature of oath or give evidence on oath.

Thus, for instance in the case ***of Issa Salum Nambaluka Vs. Republic, Criminal Appeal No. 272 of 2018, the Court of Appeal held;***

> *"In the case of Godfrey Wilson, Criminal Appeal No. 168 of 2018 (unreported), we stated that, where a witness is a child of tender age, a trial Court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replied in the affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the Religion professed by such child witness. If that child does not know the nature of oath, he or she should before give evidence, be required to promise to tell the truth and not to tell lies*".

In the instant case, the trial court records provide that the voire dire test was conducted and at the end the court reached the conclusion that the child does not understand the meaning of oath but he has sufficient intelligence and knows the duty of speaking the truth. It is quoted:

> " ***the child doesn't understand the means of oath he has sufficient intelligence and he knows the duty of specks the truth. He is to be allowed to promise and give his evidence."***

I have nothing on record to assist me to know how the learned trial magistrate arrived to such a conclusion. I cannot therefore rely on such general conclusion by the learned magistrate as reflecting the reality to the effect that PW1 fitted into the exemption of giving evidence without oath. Even taking the conclusion supra the same is confusing. It tells us that PW1 did not even indicate to possess knowledge of appreciating the nature of telling the truth.

At the same time the conclusion tells us that the witness promised to tell the truth and not lies. How could a witness who does not possess knowledge of appreciating the nature of telling the truth could promise to tell the truth. Under the circumstances, it was imperative that the records speak by themselves so that we could know the reasons behind which drove the learned trial magistrate to reach the conclusion she reached.

Her conclusion suggests that the witness neither knew telling the truth nor suggested that the witness knew the nature of oath. Acting on that purported evidence is absolutely wrong on the strength of the authorities I have cited.

On that observation, the evidence of PW1 is expunged from records as it was improperly admitted.

Furthermore, PW4 tendered exhibit P1 which is PF3, which incriminated the appellant. The PW4 averred that, after had examined the victim, he found anus of the victim being lose and had scars to mean a certain blunt object was inserted.

When I referred to exhibit P1 the records show that it was just admitted without the appellant being dully involved whether he objected it or in any way was asked to respond to it.

In regards to the admissibility of exhibits, the law requires that, the documentary evidence to be read out in order to ascertain and make clear understood to the parties.

In the case of: ***Robinson Mwanjisi and Others versus Republic, (2003) TLR***, where the Court stated among other things that,

"..whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out "

See also the case of ***Mbaga Julius versus Republic, Criminal Appeal No.131 of 2015, Jumanne Mohamed and two others versus Republic, Criminal Appeal No.534 of 2015*** (unreported) and the case of ***Nkolozi Sawa and Another versus Republic, Criminal Appeal No.574 of 2016 (CAT)*** at page 7.

In the case of **Nkolozi** (supra), the Court observed that:

"Failure to read out the documentary exhibits was irregular as it denied the appellants an opportunity of knowing and understanding the contents of the said exhibits"

In the case at hand, exhibits P1 (PF3), was not read before the Court. the shortcoming to that effect is that such exhibits is expunged from the court records as it was wrongly admitted.

Having expunged the PW1's evidence, and since the best evidence in sexual offences comes from victim, the prosecution's case remains with no any tangible evidence to establish the offence arraigned against the appellant. By so observing, there remains no other independent evidence

which incriminate the appellant with the offence charged. PW3 possess hearsay evidence as she was just informed about the incidence and PW2 he was also informed of the incidence the same does not possess any medical skills to ascertain what testified before the court.

Other issues to be discussed are defectiveness of the charge and sentence entered by the trial court.

The law is clear under section 132 of the Criminal Procedure Act, Cap 20 RE: 2019 which reads;

> "E*very charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"*

I am of the settled view that, when the charge sheet is defective, is a legal defect that goes to the roots of the case and as a result, the whole proceedings, judgment and orders become a nullity. The reason behind being that, failure of the prosecution to properly prepare charge against the accused with a proper offence, section of law and particulars, leaves

doubts as to whether the accused was availed with the right to know the contents and particulars of his charge.

Reference can also be made to the decision of the Court of Appeal in ***Abdallah Ally Versus Republic, Criminal Appeal No. 253 of 2013,*** where it was observed and held that:

"... being found guilty on a defective charge based on wrong charge or and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the courts below..."

This view was maintained by the Court of Appeal in the case of ***Frank Kanani vs Republic Criminal Appeal No. 425 of 2018*** adding that, a defective charge will deny the accused person a chance to properly prepare his defence. See also the case of ***Peter Kombe vs Republic Criminal Appeal No. 12 of 2016, Kashima Mnadi vs Republic, Criminal appeal No.78 of 2011 and Magesa Chacha Nyakibali & Another, Criminal Appeal No.307 of 2013.***

In the instant appeal, when I went to the trial court records and find that the provision and particulars of the of the offence were not certain.

This is evidenced when the trial magistrate when pronounced the sentence applied the provision of section 154 (1)(a) (2) of the Penal Code which was not mentioned in the charge sheet.

> ***".....This court sentences accused to go to jail for life imprisonment subject to Section 154 (1) (2) of the Penal Code Cap 16 Re 2019 order accordingly..."***

The charge reads ***"UNNATURAL OFFENCE; CONTRARY TO SECTION 154(1)(a) OF THE PENAL CPODE CAP 16 RE 2019"***

Particulars of the offence ***" Edward S/o Charles @Edu on divers dates between 11th day of April 2020 to 14th day of October, 2020 at Ndembezi area within Shinyanga Municipality in Shinyanga region did have carnal knowledge of one Joseph Juma Kahanya against order of nature"***

Now, from the point of view it is clear that the particulars of the offence were not well described especially the age of the victim was not initially mentioned in the charge, and therefore the trial Magistrate erred to invoke sub section (2) when sentencing the appellant as it was not originally mentioned in the charge sheet against the appellant. See at page 29 of the typed trial proceedings.

With all these observations, I find this appeal to have been brought with sufficient cause, I allow it and order the appellant's immediate release from custody unless otherwise lawfully held.

DATED at **SHINYANGA** this 18th day of July, 2023.

F.H. MAHIMBALI

JUDGE

Judgment delivered today the **18th day of July, 2023** in the presence of the appellant and respondent being represented by Ms Mboneke Ndimubenya, learned State Attorney and Ms Beatrice, RMA, present in Chamber Court.

Right of appeal explained.

F.H. MAHIMBALI
JUDGE
18/7/2023