IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 166 OF 2022

(C/F Criminal Case No. 352 of 2020 in the Resident Magistrate Court of Arusha at Arusha)

MICHAEL ROBERT.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

22/06/2023 & 20/07/2023

MWASEBA, J.

Michael Robert, the appellant herein, is challenging the conviction and sentence of 30 years imprisonment imposed on him by the Resident Magistrate's Court of Arusha at Arusha. He stood charged with Unnatural offence contrary to **Section 154 (1) and (2) of the Penal Code**, Cap 16 R.E 2019.

The particulars of the offence show that on the 4th day of December 2020 at Shamba la Kilimo area within the Arumeru District and Region of Arusha, the appellant did have carnal knowledge of one "JJL" (name withheld) a boy aged 15 years old against the order of nature, the act

which contravenes the law. He was accordingly convicted and sentenced to thirty (30) years of imprisonment.

Aggrieved by the said conviction and sentence, he preferred the present appeal in which he raised six (6) grounds of appeal. In the first ground he is challenging that PW2 (the victim) and PW3 gave the evidence without being sworn. In the second ground of appeal, he is complaining that exhibit P1(PF3) was admitted but it was never read aloud after its admission. In the third ground he is challenging that he was convicted while there was a contravention of Section 192 (2), (3) of the CPA. In the fourth ground of appeal, he is claiming that his evidence was never considered by the trial court. In the fifth ground of appeal, he is complaining that the prosecution evidence was marred with contradiction and inconsistency and lastly the charge was not proved beyond a reasonable doubt.

When this appeal came for hearing, the appellant fought solo, unrepresented whilst the respondent enjoyed the legal service of Ms. Eunice Makala, learned State Attorney. With the consent of the parties and the leave of the court, the appeal was argued by way of written submission.

Submitting in support of the first ground of appeal, the appellant argued that PW2 (the victim) and PW3 did not swear before testifying as required by the law since they were not children of tender age as per **Section 127 (2) of the Evidence Act**, Cap. 6 R.E 2019 and prayed for their evidence to be expunged from the records. His arguments were supported by the case of **Julius Martin and Another vs Republic**, Criminal Appeal No. 42 of 2020 (Unreported).

Supporting this ground, Ms. Makala submitted that, the trial Magistrate Mistakenly conducted a *voire dire* test while both PW2 na PW3 were sixteen years of age. Thus, the court did not comply with **Section 198 (1) of the Criminal Procedure Act**, Cap 20 R.E 2019. Thus, she submitted that the evidence of PW2 and PW3 lacks evidential value, hence this ground has merit. Her argument was supported by the case of **Norbert Kashindi vs Republic**, Criminal Appeal No. 176 of 2016 (CAT at Tabora, Unreported).

Regarding the second ground of appeal, the appellant complained that Exhibit P1 (PF3) was not properly identified by PW1 before being tendered to be admitted as an exhibit. Further, it was not read aloud after it was admitted as required by the law. He prayed for the same to be expunged

from the record. He cited the case of **Robinson Mwanjisi vs Republic**, [2003] T.L.R 218.

Replying to this ground, Ms. Makala contended that Exhibit P1 was read out after its admission as evidenced on page 9 of the trial court proceedings, therefore this ground has no merit.

Coming to the third ground of appeal, the appellant submitted that the trial court did not comply with **Section 192 (2) and (3) of the Criminal Procedure Act, Cap 20 R.E 2022**. It was his submission that the trial court did not explain to the accused person the purpose of the preliminary hearing, further that the records are silent as to what happened during the preliminary hearing which is fatal. He supported his argument with the case of **Raphael Paul @ Makongojo vs Republic**, Criminal Appeal No. 250 of 2017.

Responding to the third ground, Ms. Makala contended that the same has no merit as **Section 192 (1), (2), and (3) of the CPA** was complied with at the trial court as evidenced on pages 3 and 4 of the proceedings. She submitted that it was not true that a plea of guilty was entered after the memorandum of agreed facts were listed.

The appellant submitted on the fourth ground of appeal that his evidence was only summarized by the trial magistrate, but it was never considered when she was analysing the same and no reasons were given why his evidence was never considered. He supported his evidence with the case **Tanzania Breweries Ltd vs Antony Nyingi** [2006] T.L.S 99.

Opposing this ground Ms. Makala submitted that the appellant's evidence was well considered by the trial court as per page 6 of the trial court's judgment. She argued further that even if this court finds his evidence was not considered it has the power to re-evaluate the evidence of the trial court as it was held in the case of **Joseph Leonard Manyota vs Republic**, Criminal Appeal No. 485 of 2015 (Unreported). She submitted further that this ground too has no merit.

Lastly, on the fifth and sixth grounds of appeal, the appellant complained that the records of the trial court particularly on PW1, PW2, and PW3 were not clear and understandable, there are a lot of grammatical faults which makes difficult for the appellant to understand what is going on and there was a lot of discrepancies. He supported his arguments with the case of **Goodluck Kyando vs Republic**, [2006] T.L.R 363.

Responding to this ground, Ms. Makala submitted that although she supported that the proceedings of the trial court had a lot of grammatical

faults when typed the same did not prejudice the appellant as he was present during the trial and heard all the prosecution witnesses when they were testifying. As for the issue of contradiction, she submitted that there was no contradiction between PW1, PW2, and PW3 as each one explained what happened and what he knows about the incident. More to that, if there are any contradictions, they are just minor that did not go to the root of the case. It was her submission that the prosecution proved the charge beyond reasonable doubt. She supported her argument with the case of **Emmanuel Lyabonga vs Republic**, Criminal Appeal No. 257 of 2019 (CAT at Iringa, Unreported).

In his brief rejoinder, the appellant reiterated what has already been submitted in his submission in chief.

I have considered the grounds of appeal and the submissions made by the appellant and that of the learned State attorney. The issue for determination is whether the appeal is meritorious.

Starting with the 1st ground of appeal, the appellant complained that the evidence of PW2 and PW3 was taken contrary to **Section 198 (1) of the CPA** as they did not swear or affirm before giving their testimonies. His argument was supported by Ms. Makala who stated that the trial Magistrate mistakenly treated PW2 and PW3 as children of tender age and

proceeded to conduct voire dire test. Hence, they did not swear before giving their evidence. Therefore, their evidence is of no evidential value.

Section 198 (1) of the CPA imposes a duty on the trial court to administer oath /affirm to every witness before being examined. The cited section provides that:

> "*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 Oaths and Statutory Declarations Act.*"

The same was provided in the case of **Norbert S/O Kashindi vs Republic** (Supra):-

> "*The evidence which is taken in breach of Section 198 (1) of the CPA has no evidential value.*"

See also the case of **Salum S/O Said Kanduru vs Republic,** (Criminal Appeal No. 122 of 2018) [2019] TZCA 379 (4 November 2019) (Tanzlii).

In our present case, the records of the trial court show that the trial magistrate did conduct a *voire dire* test on PW2 and PW3 while they were not children of tender age. Thereafter, they promised to tell the truth as required by **Section 127** of the Evidence. Thus, non-compliance with **Section 198 of the CPA** as submitted herein renders the evidence of

PW2 and PW3 of no value and deserves to be discarded. For that reason, the evidence of PW2 (the victim) and PW3 is hereby discarded.

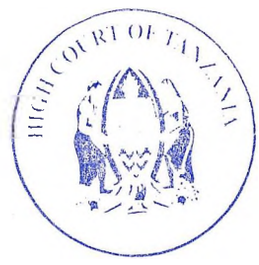
Having discarded the evidence of PW2 (the victim) and PW3 who witnessed the commission of the offense, this court remains with the evidence of PW1 (the doctor) whose evidence is not sufficient to prove the charge against the appellant unless it is corroborated with other evidence. PW1 does not know who sodomised the victim (PW2). Thus, the evidence of PW1 alone without any other evidence to corroborate the same has no leg to stand on its own and the same cannot prove the charge against the appellant herein.

For the reason explained herein, the first ground of appeal is sufficient to dispose of the whole appeal, thus, there is no need to determine the rest of the grounds.

As demonstrated herein above, this court finds merit in the appeal. The guilt of the appellant was not proved beyond reasonable doubt. In the event, I allow the appeal, quash the conviction, and set aside the sentence. The appellant is to be released from prison forthwith unless he is otherwise lawfully held.

It is so ordered.

DATED at **ARUSHA** this 20th day of July 2023.



N.R. MWASEBA

JUDGE