IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 68 OF 2022

(Originated from Criminal Case No. 362 of 2019 at the Resident Magistrate's Court of Arusha at Arusha)

BETWEEN

MOHAMED S/O CHARLES TEMU

@ FUNDI MUDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

22/06/2023 & 20/07/2023

MWASEBA, J.

The appellant, Mohamed S/O Charles Temu @ Fundi Temu was charged with Unnatural Offence contrary to **Section 154 (1) (a) (2) of the Penal Code**, Cap 16 R.E 2002. The prosecution alleged that on diverse dates and months of the year 2019 at Mbauda area within the City, District and Region of Arusha the appellant had carnal knowledge of one "KL" (name withheld to conceal his identity) a boy of five (5) years old against the order of nature, the act which contravenes the law.

The appellant pleaded not guilty to the charge. At the hearing of the case before the trial, the prosecution case was constructed on the

testimonies of four (4) witnesses with one (1) exhibit while one (1) witness concluded the defence case. After the trial Magistrate was satisfied that the prosecution evidence weighed more than the defence of the appellant, and had proven the offence, the appellant was convicted of Unnatural Offence and sentenced to thirty (30) years imprisonment.

With the belief in his mind that he is innocent, the appellant lodged the present appeal to this court based on ten (10) grounds of appeal as portrayed in the petition of appeal and additional grounds filed on 30/09/2022.

When this matter came up for hearing, the appellant being a lay person stood unrepresented while the respondent enjoyed the legal service of Ms. Eunice Makala, learned State Attorney.

Submitting in support of the appeal on the 1st and 10th grounds, the appellant stated that the charge sheet was defective for failure to indicate the time when the offence was committed. He added that when the charge sheet shows that the offence was committed on diverse dates, PW3 (victim's grandmother) stated that the offence occurred on 28/08/2019 and they realized it on 29/08/2019. Furthermore, the victim (PW1) said the act was committed once. He supported his argument

with the case of **Mashaka Bashiri vs Republic**, Criminal Appeal No. 242 of 2017 and prayed for the court to find merit on this ground.

Amplifying the 2nd ground of appeal, the appellant submitted that the evidence of PW1 was taken contrary to **Section 210 (3) of the Criminal Procedure Act**, Cap 20 R.E 2019 as the magistrate did not sign after recording his evidence. He substantiated his argument with the case of **Richard Mebolokini vs Republic**, [2000] T.L.R 90, and prayed for the evidence of PW1 to be disregarded.

On the 3rd and 6th grounds of appeal, the appellant complained that the prosecution evidence was tainted with contradictions. He added that the said contradictions can be noticed when PW1 said after he was sodomized, he ran and told his grandmother while PW3 (his grandmother) stated that she became aware of the act the next day after PW1 told her that his anus was hurting. Another contradiction is when PW3 said the offence was committed on 29/08/2019 evening hours and later on he stated that the offence occurred on 28/08/2019 and he became aware of it on 29/8/2019. The appellant submitted further that even PW2 (the doctor), when he was tendering exhibit P1, it was already in his possession which is contrary to the law and the same was neither shown to him for identification nor read out after its

admission. His arguments were supported by the case of **Hussein Idd and Another vs Republic**, (1986) T.L.R 166, and prayed for the court to find merit on this ground.

Coming to the 4th ground of appeal, the appellant submitted that the prosecution failed to call material witnesses who are Sofia, Prosper Molell, and his wife who were the first people to be called and examined PW1. He submitted further that even the Chairman who sent a militia to arrest the appellant was not called to testify. Thus, he prayed for the adverse inference to be drawn against the prosecution for failure to call those material witnesses. His arguments were substantiated by the case of **Hemed Said vs Mohamed Mbilu** [1986] T.L.R 15.

Submitting on the 5th ground of appeal, the appellant complained that the evidence was fabricated as no police investigator testified as it was the evidence from family members only. So, he was of the view that the case was not proved beyond a reasonable doubt. The case of **Yohana Chibwangu vs Republic**, Criminal Appeal No. 117 of 2015 was cited to support his argument.

Regarding the 8th ground of appeal, the appellant complained that **Section 231 (1) of CPA** was not complied with as the trial magistrate did not explain to the appellant his right as to the mode of giving his

defence or whether he would have witnesses to call. He supported his argument with the case of **Emmanuel Richard @ Humbe vs Republic**, Criminal Appeal No. 396 of 2018 (Unreported).

On the 9th ground of appeal, the appellant complained that **Section 127(2) of the Evidence Act**, Cap 6 R.E 2019 was not complied with as no examination was conducted to know if the victim knew the meaning and nature of an oath. He cited the case of **John Mkorongo James vs Republic**, Criminal Appeal No 498 of 2020 (Unreported).

Ms. Makala's response to the 1st, 3rd, and 10th grounds of appeal was to the effect that, the charge was not defective as the statement of PW3 (grandmother) that the victim was sodomized on 28/08/2019 does not mean the offence was committed on that day alone. Thus, taking into consideration the child was a minor who did not know the exact dates, the alleged variation is just a minor one that did not go to the root of the case. He supported his arguments with the case of **Dickson Elia Nsamba Shapwata and Another vs Republic**, Criminal Appeal No. 92 of 2007 (Unreported).

Submitting in opposition to the 2nd ground, Ms. Makala argued that it is true that **Section 210 (3) of the CPA** was not complied with by the trial court, however, the noncompliance did not prejudice the appellant

Makala

since at the end he adduced his evidence. Her argument was substantiated with the case of **Juma Hassan vs Republic**, Criminal Appeal No. 458 of 2019 (CAT at Arusha). Thus, this ground has no merit.

Responding to the 4th ground of appeal, Ms. Makala submitted that the prosecution has to determine the witnesses they wanted to prove their case, and no particular number is required as per **Section 143 of Tanzania Evidence Act,** Cap 6 R.E 2019. She supported her argument with the case of **Erick Maswi vs Republic**, Criminal Appeal No. 179 of 2020.Therefore, this ground has no merit too.

On the 5th ground of appeal, Ms. Makala replied that the evidence of the prosecution was not fabricated as alleged. She averred that even during cross-examination the appellant failed to raise any questions to show that the evidence was fabricated. To demerit this ground she referred this court to the case of **John Madata vs Republic**, Criminal Appeal No. 453 of 2017.

Responding to the 6th ground of appeal, she submitted that the case was proved beyond a reasonable doubt. She submitted further that to prove an unnatural offence they were required to prove the penetration and the same was proved by PW1 (the victim) who stated that the appellant

inserted his penis into his anus and his evidence was supported with the evidence of PW2 (the doctor) who diagnosed that the muscles at the victim's anus were loose due to penetration of a blunt object. Further to that, Exhibit P1 (PF3) was cleared for admission before it was tendered as an exhibit, and if the court would find otherwise still the evidence PW1 would prevail to prove the charge. She supported her argument with the case of **Selemani Makumba vs Republic** [2006] T.L.R 372.

Replying to the 7th ground of appeal, Ms. Makala contended that the evidence of the appellant was considered. She submitted further that if the court will find that it was not considered, it has the power to step into the shoes of the trial court and consider the same. Her argument was supported by the case of **Athuman Musa vs Republic**, Criminal Appeal No. 4 of 2020 (CAT Unreported).

As for the 8th ground of appeal, Ms. Makala argued that **Section 231 (1)** of the CPA was complied with as evidenced by page 27 of the trial court proceedings. So, this ground has no merit too.

Lastly, on the 9th ground, Ms. Makala submitted that **Section 127 (2) of Tanzania Evidence Act** was complied with as the child did promise to tell the truth and not lies. Thus, this ground has no merit, and she cited the case of **Wambura Kiginga vs Republic**, Criminal Appeal No.

301 of 2018 (CAT at Mwanza, Unreported). So, she prayed for the appeal to be dismissed and the conviction and sentence of the trial court to be upheld.

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

Starting with the 2nd ground on the additional grounds of appeal, the appellant complained regarding non-compliance of **Section 127 (2) of the Evidence Act**. The appellant alleged that the evidence of PW1 was taken contrary to the cited section. However, Ms. Makala was of the view that the section was complied with as the child promised to tell the truth.

Section 127 (2) of the Evidence Act 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."*

Regarding the cited provisions, there are a number of decisions of the Court of Appeal that have discussed what the provision requires and its significance. For instance, in the case of **Edmund John @ Shayo vs**

Republic, Criminal Appeal No. 336 of 2019 (CAT at Moshi, reported at Tanzlii) it was held that:

> *"Where the evidence of a child of tender age is taken without oath, the intended witness must promise the court to tell the truth and not to tell lies.* ***That, in the absence of any direction engrained in the provision of how the promise can be procured, the court must prior to getting the said promise, ask few and simple questions to the said witness to determine, foremost, whether the child understands the nature of oath or affirmation****. When the answer is in the affirmative then receive the testimony under oath or affirmation. If not, then the child witness should be required to promise to tell the truth and not tell lies."* (Emphasis is mine).

In our present case, the records of the trial court on page 16 show that:

> ***Public prosecutor:*** *The matter is coming for hearing and we are ready.*
>
> ***Accused:*** *I am ready.*
>
> ***PROSECUTION CASE OPENS***
>
> *"PW1, K.L, 6 years, residence of Mbauda, a pupil of standard I, Christian, promised to tell the truth as follows."*

Based on the excerpt above, the trial court records do not show how the trial magistrate reached to the conclusion that the child victim had

promised to tell the truth. There are no any questions that were imposed to the child victim to ascertain whether he understood the nature of oath or affirmation and whether he had to promise to tell the truth and not tell lies. Failure to do that renders the evidence of the said child of no value. This was well stated in the case of **John Mkorongo James vs Republic**, Criminal Appeal No. 498 of 2020 (CAT-Unreported) that:

> "*The omission to conduct a brief examination on a child witness of a tender age to test his competence and whether he/she understands the meaning and nature of an oath before his/her evidence is taken on the promise to the court, to tell the truth, and not tell lies, is fatal and renders the evidence valueless.*"

That being the legal position, having found that there was a contravention of **Section 127 (2) of Evidence Act** in the instant matter with regard to recording PW1's evidence, unquestionably, renders the said evidence insignificant. The consequence is to expunge the said evidence from the record as I hereby do.

Having eradicated away the evidence of PW4, the question here is whether the remaining evidence is sufficient to support the appellant's conviction. The remaining evidence is that of PW2 (the doctor) and PW3 (the victim's grandmother) whereby the evidence of PW2 cannot

stand on its own without corroboration. The evidence of PW3 was just hearsay evidence as she said what she was told by PW1 (the victim) a day after the incident following the information she got from her house helper named Sofia that PW1 was feeling pain at his anus. PW3 stated further that after noticing that PW1 was sodomized she went to call the neighbour whereby the victim mentioned the appellant as the one who sodomized him. However, those neighbours were not called to testify. More to that PW3 said that the victim was with his friend when the appellant took him, but the said friend was not called to testify. Further to that, even the police investigator who investigated the case was not called to testify.

On the other hand, the evidence of PW2 (the doctor) also cannot stand on its own to warrant conviction as the doctor is not aware as to who sodomized the victim in order to warrant the conviction of the appellant.

Therefore, it is crystal clear that in the absence of the evidence of PW1, which narrated how the appellant sodomized him, the remaining evidence is weak to prove the offence charged against the appellant and thus cannot sustain his conviction. As it was held in the case of **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda vs Republic**, [2006] T.L.R 395 the court held that: -

"In a criminal trial, the burden of proof always lies on the prosecution and the proof has to be beyond reasonable doubt."

Thus, as the 2nd ground in the additional grounds of appeal, suffices to dispose of the appeal, I find no reason to proceed to address the remaining grounds of appeal.

In the final analysis, I allow the appeal, quash the conviction against the appellant, and set aside the sentence imposed against him. The appellant is to be released from prison immediately, unless otherwise lawfully held.

It is so ordered.

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

HIGH COURT OF TANZANIA

N.R. MWASEBA

JUDGE