IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 61 OF 2022

(Originating from Criminal Case No. 41 of 2021 of Moshi District Court at Moshi)

BAHATI S/O VENANCE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

30/06/2023 & 25/07/2023

SIMFUKWE, J.

The appellant, Bahati s/o Venance, was charged before the District court of Moshi with unnatural offence contrary to **section 154 (1) (a) (2) of the Penal Code, Cap. 16 R.E. 2019**. The particulars of the offence were that on 27th day of January 2021 at Mikocheni TPC area within Moshi District in Kilimanjaro Region, the appelant did have carnal knowledge with one BSJ (not her real names) a girl of 05 years old against the order of nature.

Before the trial court, the prosecution paraded six witnesses. The victim testified inter alia that on the fateful day she was from Mama Asia when the appellant herein asked her to buy some flour for him from Mama Rukaya's shop. She was given 500/= and she bought flour for the appellant who was residing at Yasin's house. That, when the victim took the flour to the appellant, she was sodomised by the appellant on promise that he would buy for her maandazi, sweets and biscuits. When the victim

reached at home she had pains when she went to the toilet. She cried for help and her mother saw blood in her anus. The victim mentioned the appellant herein to be the person who had sodomised her. Then, the appellant was traced and arrested.

The story of the victim was supported by the testimony of her mother (PW1) and PW6 the doctor who examined her.

In his defence before the trial court, the appellant denied to have committed the offence.

The trial court convicted the appellant on the strength of the evidence of the victim and sentenced him to serve thirty years imprisonment. The appellant was aggrieved by the decision of the trial court, he lodged the instant appeal against both conviction and sentence, on eight grounds:

1. *That, the learned trial Magistrate erred in law and fact to convict the Appellant by basing on the evidence of PW2 (the victim) which was unlawfully taken. PW2's promise to the court before giving evidence was incomplete as to offend section 127 (2) of the Tanzania Evidence Act (Cap 6 R.E 2019).*
2. *That, the Trial court erred in law and fact to convict the appellant without the appellant being properly identified by PW2 (the victim).*
3. *That, Trial Magistrate erred in law and fact to convict the Appellant but failed to see that the prosecution evidence is highly contradictory, incredible and unreliable, it cannot support a conviction.*

4. *That, the learned trial magistrate erred in law and fact to convict the Appellant without sufficient evidence, as the case/charge against the appellant was not proved beyond reasonable doubt.*
5. *That, the learned trial magistrate erred in law and fact in basing his judgment on extraneous matter not born from the evidence adduced by the witnesses.*
6. *That, the trial Magistrate grossly misdirected himself in convicting the Appellant without considering or making any reference to the Appellant's defence evidence.*
7. *That, the trial court erred in believing that the appellant committed the charged offence in a case where there is no police investigation and no police officer testified to confirm the truthfulness of the allegation against the appellant.*
8. *That, the Trial court erred when without proper examination of the evidence, proceeded to convict and sentence the Appellant who did not commit any crime.*

The appellant prayed that conviction against him be quashed and sentence be set aside.

During the hearing, the appellant was unrepresented while Mr. John Mgave, learned State Attorney appeared on behalf of the respondent. The appellant prayed that the appeal be argued by way of written submissions, his prayer was granted.

On the first ground of appeal, the appellant submitted that the reception of evidence of child of tender age is currently governed by **section 127**

(2) of Tanzania Evidence Act, Cap 6 R.E 2019. That, the section is couched in mandatory terms as follows:

> *"127(2). A child of tender age may give evidence without oath or affirmation, but shall before giving evidence, promise to tell the truth to the court and not to tell lies."*

Referring to the case at hand, the appellant stated that when the victim (PW2) appeared before the trial court, the trial Magistrate asked her simplified questions so as test her intelligence and if she was capable to understand the questions put to her. That, the trial Magistrate asked PW2 if she will speak the truth and the child replied that:

> *"Answer: Yes, I promise to speak the truth."*

The appellant was of the view that the child gave an incomplete promise before the court as the above quoted provision requires the child to **"Promise to tell the truth and not tell lies."**

It was commented that it was wrong and prejudicial for the learned trial Magistrate to record and to rely upon the evidence of PW2 while it contravened the mandatory provision of the law. The appellant made reference to the Court of Appeal decision in the case of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2019,** at page 13 where the Court held that:

> *"The trial Magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, S. 127 (2) of T.E.A as amended imperatively requires a child of a tender age to give a promise of telling the truth and not tell lies before she or he testifies in Court. This is a condition*

precedent before reception of the evidence of a child of a tender age."

The appellant averred that guided by the above cited case law, nothing of that sort was done in the case at hand. That, soon after PW2 gave half and incomplete promise of telling the truth, without promising whether she will tell lies, the trial Magistrate went ahead and started recording down the evidence of the particular witness. He prayed this court to disregard PW2's evidence who was a key witness. That, if the said evidence will suffer the fate of being expunged from the record, the prosecution's case will have no legs to stand.

Also, the appellant faulted the trial Magistrate for misdirecting herself by using unborn evidence in composing judgment. He quoted from page 4 of the judgment where the trial Magistrate stated that PW2 identified the appellant at the police station and before the trial court. The appellant made it clear that no witness had stated that the victim had identified the appellant at the police station. That, the victim never identified the appellant anywhere and she denied to have known him at the beginning of her evidence and pointed at the appellant to be the person she was referring to, at the end of her evidence. The appellant supported his submission with the case of **Abiola Mohamed v. Republic, Criminal Appeal No. 291 of 2017,** in which the Court of Appeal held inter alia that:

"However, we wish to emphasize as we did in the case of Mohamed Said (supra) the need of subject the evidence of the victim to scrutiny in order for courts to be satisfied that what they testified is nothing but the truth. The testimony of the victim of sexual offence

should not be taken as a gospel truth but has to pass the test that courts will ensure that only deserving offenders are kept behind bars and the innocent are set free…."

Guided by the above cited case law, the appellant said that the learned trial Magistrate in this case did not take any precaution and she ended up in relying upon the evidence of PW2 (the victim) and took it as a gospel truth which resulted into a miscarriage of justice and wrongly convicted and sentenced the appellant.

The appellant continued to fault the trial court for failing to note that the prosecution never called material witnesses to wit, the arresting police officer and the police investigator. That, the arresting officer could have narrated to the court the connection she/he used to arrest the appellant; while the investigator could have explained to the court on what he/she investigated pertaining the accusation against the appellant and shed more light on the truthfulness of the case at hand. Failure of which, the appellant prayed this court to draw an adverse inference to the prosecution as it is clear that there was something fishy behind the case against the appellant.

Responding to the first ground of appeal, Mr. John Mgave learned State Attorney submitted that the provision of **section 127(2) of the Evidence Act** (supra) was properly complied by the trial Magistrate before PW2 could give evidence and after being assessed by the court. That, it was clear to the court that the child was able to tell the truth and not lies as seen at page 9 of the typed proceedings of the trial court. Mr. Mgave was of the view that it is not mandatory for a child after promising to tell the truth before the court, to tell again if she will not be telling lies

as it was decided in the case of **Mathayo Laurent William Mollel v. Republic, Criminal Appeal No. 53 of 2020,** in which the Court of Appeal stated that:

> *"We understand the legislature used the words "promise to tell the truth to the court and not to tell lies." We think the tautology is evident in the phrase for in our view to tell the truth simply means not to tell lies. So, a person who promises to tell the truth is in effect promising not to tell lies."*

The learned State Attorney submitted further that the tautology in the subsection is in their opinion a drafting inadvertency and therefore the trial court was right to receive the evidence after clear assessment of the child which in itself was complete.

On the second ground of appeal which concerns identification of the culprit, Mr. Mgave replied that the ground lacks merit since the victim properly identified the accused person. That, from the proceedings of the trial court it is evident that the victim named the appellant to her mother and elaborated that it was that "**baba mmoja anayekaa kwa Yasin**" who raped her as per page 10 of the typed proceedings. That, evidence of PW1 the mother of the victim corroborated evidence of the victim which proved that the appellant was not new to that area. Mr. Mgave cemented his argument with the case of **Khalifa Katumboni and 3 Others v. Republic [1994] TLR 129** CAT, in which it was held that:

> *"Where the accused was known to the witness well before the day of incident, the witnesses therefore were unlikely to mistaken him."*

That, PW3 the owner of the house also confirmed that he had permitted the appellant to live in his house when he was not around as per page 11 of the trial court typed proceedings.

On the third ground of appeal, the learned State Attorney contended that evidence of prosecution witnesses was not contradictory but consistent, cogent, spontaneous and reliable. He commented that the best evidence in sexual offences comes from the victim pursuant to the dictates of **section 127(7) of the Tanzania Evidence Act** (supra). Mr. Mgave stated further that, the appellant did not specify the alleged contradictions although not every discrepancy in the prosecution case will cause the prosecution case to flop. He cited the case of **Mzee Ally Mwinyi Mkuu @ Babu Seya v. Republic, Criminal Appeal No. 499 of 2017,** CAT.

On the fourth ground of appeal, it was replied that the prosecution had sufficient evidence to prove the offence of unnatural offence based on the ingredients of the offence. That, the prosecution proved that the victim was sodomised as per expert evidence of PW6 a doctor who tendered exhibit P1 which indicated that the muscles of the victim's anus were loose, spermatozoa were found in the anus and vagina. That, the victim was penetrated both in the vagina and anus. That, it was the victim who identified the appellant at the police station, before the court and described what the appellant did to her.

On the fifth ground of appeal, the learned State Attorney submitted that the judgment was clearly based on the evidence adduced by the prosecution witnesses together with exhibit tendered in court. Mr. Mgave cited the case of **Marcelino Koivogui vs. Republic, Criminal Appeal No. 469 of 2017** in which the Court of Appeal cited the case of **Shabani**

Daud vs. Republic, Criminal Appeal No. 28 of 2001, which at page 17 emphasized that:

> *"In that regard every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

In that regard, Mr. Mgave was of the view that the trial Magistrate was right to convict the appellant and that the evidence was not extraneous.

On the 6th ground of appeal, it was replied that it is evident that at page 5 of the judgment, the trial Magistrate considered the defence of the appellant but it was not fit to shake the prosecution case.

On the 7th ground of appeal which concerns failure to call material witnesses, Mr. Mgave submitted that the prosecution had discretion to call witnesses of their choice to prove their case beyond reasonable doubts. He stressed his argument by citing the case of **Skona Rolyani Munge and Others vs. Republic, Criminal Appeal No. 51 of 2020**, in which the Court of Appeal at page 14 and 15 cited the case of **Mwita Kigumbe Mwita and Another v. Republic, Criminal Appeal No. 63 of 2015** and stated that:

> *"In each case, the Court looks for quality and not the quantity of evidence placed before it. The best test for the quality of any evidence is its credibility. It was for the prosecution to determine the witness should prove whatever fact it wanted."*

From the above decision, Mr. Mgave concluded that calling a police officer was immaterial and not mandatory in law. That, the appellant did not

state how failure to call the police officer and investigator occasioned injustice to him.

On The 8th ground of appeal, Mr. Mgave replied that the trial Magistrate did evaluate the evidence properly that led to the conviction of the appellant as evidenced at page 4 to 6 of the trial court proceedings where she evaluated evidence of the prosecution and at page 5 to 6 of the typed judgment where the trial Magistrate evaluated evidence of the appellant before finding that the said evidence did not shake the prosecution case. Reference was made to the case of **Amiri Mohamed v. Republic [1994] T.L.R 138**, in which the Court held that:

> *"Every Magistrate or Judge has got his or her own style of composing a judgment, and what vitally matters is that the essential ingredients shall be there and these include critical analysis of both the prosecution and the defense."*

That, the trial Magistrate was therefore correct and properly examined the evidence that led to the conviction of the appellant.

The learned State Attorney prayed that this appeal be dismissed and conviction and sentence be upheld.

I have considered the rival submissions of both parties, the grounds of appeal raised by the appellant and the trial court's records. From the submission of the appellant, it may be noted that he submitted on the first, second, fifth and seventh grounds of appeal. Thus, although the learned State Attorney replied the grounds of appeal seriatim, this court will determine the four grounds of appeal which were discussed by the appellant in his written submission believing that he impliedly dropped the

rest of the grounds of appeal. In determining the said grounds, this court will be guided with the issue ***whether the prosecution case was proved beyond reasonable doubts before the trial court***.

Starting with the first ground of appeal, the appellant complained that there was noncompliance of **section 127(2) of the Evidence Act** (supra) on the reason that PW2's promise to the court before giving evidence was incomplete. The learned State Attorney had differrent opinion; he submitted that the provision of **section 127(2) of the Evidence Act** (supra) was properly complied by the trial Magistrate before PW2 could give evidence and after being assessed by the court. That, it was clear to the court that the child was able to tell the truth and not lies as seen at page 9 of the typed proceedings of the trial court. Mr. Mgave was of the view that it is not mandatory for a child after promising to tell the truth before the court, to tell again if she will not be telling lies as it was decided in the case of **Mathayo Laurent William Mollel v. Republic** (supra).

The learned State Attorney submitted further that the tautology in the subsection is in their opinion a drafting inadvertency and therefore the trial court was right to receive the evidence after clear assessment of the child which in itself was complete.

According to the record, before recording evidence of PW2 the trial Magistrate examined PW2 who was a child of tender age to test her competence and asked her whether she would tell the truth. Then, the trial Magistrate recorded that the child possessed enough intelligence and that she had promised to speak the truth. In the case of **Issa Salum**

Nambaluka v. Republic, Criminal Appeal No. 272 of 2018, at page 11 it was stated inter alia 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 understands the nature of oath if he replies 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 such child does not understand the nature of oath, he or she should, before giving evidence be required to promise to tell the truth and not tell lies."*

It's a considered opinion of this court that what was done by the trial Magistrate prior to recording evidence of PW2 fits the dictates of **section 127(2)** (supra) and the cited case law. I agree with the learned State Attorney that when PW2 promised to tell the truth in other words she had promised not to tell lies. The case of **John Mkorongo** (supra) is relevant.

On the second and fifth grounds of appeal which is to the effect that the appellant was not properly identified and that the trial magistrate relied on extraneous evidence in composing judgment, having considered submissions of both parties, without further ado I concur with the appellant that he was not properly identified. PW2 stated inter alia that it was her first time to see the appellant. As rightly submitted by the appellant, the trial Magistrate relied on extraneous evidence that PW2 had identified the appellant at the police station while the same was not stated by any prosecution witness. With due respect to the learned State Attorney who also averred that PW2 identified the appellant at the police,

the same is not supported by the evidence on the trial court's record. Apart from the dock identification, the victim in this case just mentioned the perpetrator as **"kaka wa kwa Yasin"** (a brother who resides at Yasin's homestead). She did not know the name of the appellant and she was never called to identify the appellant after being arrested. It is not disputed that the appellant in this case was a stranger to the victim that's why she did not even know his name. Identification of strangers was discussed in the case of **Hamis Ramadhani Lugumba versus Republic, Criminal Appeal No. 565 of 2020, at page 17,** Court of Appeal of Tanzania at Dodoma, that:

> *"The dock identification that follows during the trial as stated in the case of **Hepa John Ibrahim** (supra) in which the case of **Musa Elias & 2 Others v. R,** Criminal Appeal No. 172 of 1993 (unreported) was of no value as was contrary to what the law provides:*
>
> > *"It is a well-established rule that **dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial.**"* Emphasis added.

On the issue of failure to call material witnesses, the appellant faulted the decision of the trial court for failure to note that the prosecution had not called material witnesses; the arresting police officer and the investigator. That, the arresting police officer could have narrated on what connection she/he had arrested the appellant; while the investigator could have

explained what she/he investigated pertaining the accusation against the appellant and shed more light on the truthfulness of the case at hand. The learned State Attorney contended that the prosecution had discretion to call witnesses of their choice to prove their case beyond reasonable doubts. He supported his argument by citing the case of **Skona Rolyani Munge and Others vs. Republic** (supra), in which the Court of Appeal at page 14 and 15 cited the case of **Mwita Kigumbe Mwita and Another v. Republic,** (supra). Mr. Mgave contended further that calling a police officer was immaterial and not mandatory in law. That, the appellant did not state how failure to call the police officer and investigator occasioned injustice to him.

This court concurs with the learned State Attorney that the prosecution has discretion to call witnesses of their choice. However, it is trite law that failure to call material witnesses draws an adverse inference against a party who has failed to call such witnesses. In this case, the issue is whether the arresting police officer and the investigator were material witnesses on part of prosecution. Literally, a material witness is a witness whose evidence is likely to be sufficiently important to influence the outcome of a trial. See **Oxford Languages Dictionary.**

In the case of **Aziz Abdallah v. R [1991] T.L.R 71** it was held that:

> *"…the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who form their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

In the circumstances of the instant matter, I join hands with the appellant that the arresting and investigating police officers were material witnesses who should have been called by the prosecution. The said officers could have cleared some doubts in respect of identification of the appellant. Short of that, I hereby draw an adverse inference against the respondent Republic.

Having found that the appellant was not properly identified, the trial Magistrate relied on extraneous evidence in composing judgment and that the prosecution failed to call material witnesses, it goes without saying that the prosecution case was not proved beyond reasonable doubt.

It is on the basis of the above findings, that this appeal is found to have merit. I therefore quash the conviction against the appellant, set aside the sentence of 30 years imprisonment and order the immediate release of the appellant, unless held for other lawful reasons.

Order accordingly.

Dated and delivered at Moshi this 25th day of July, 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

25/07/2023