IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 16 OF 2022

(Originating from the Resident Magistrate Court of Arusha at Arusha in Criminal Case No. 272 of 2018)

ABDUL AZIZI HASSAN.....APPELLANT

VERSUS

THE D.P. P..... RESPONDENT

JUDGMENT

20/07/2023 & 21/08/2023

MWASEBA, J.

Before the District Court of Arusha at Arusha, the appellant, Abdul Aziz Hassan and another who is not subject for this appeal were charged with four counts of unnatural offence contrary to **Section 154 (1) (a) of the Penal Code**, Cap 16 R.E 2019. The prosecution alleged that, on 6th day of August, 2018 and on unknown dates of 2018, at Long dong area within the city, District and Region of Arusha, the appellant and his co accused did have carnal knowledge of one **J.E** (Name not disclosed to hide identity), a boy of ten (10) years against the order of nature.

They both pleaded not guilty to the charge. At the hearing of the case before the trial court, the prosecution had testimonies of six (6) witnesses with two (2) exhibits while a total of three (3) witnesses concluded the defense case. After the trial Magistrate was satisfied that the prosecution evidence weighed more than defense, and had proven the offence, the appellant was found guilty, convicted and sentenced him to thirty (30) years imprisonment. His co accused person was found not guilty of the offence and he was acquitted.

With the conviction in his mind that he is innocent, the appellant lodged the present appeal to this court stating seven (7) grounds of appeal as represented from the memorandum of appeal.

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

Amplifying the 2nd ground of appeal, the appellant told the court that he was convicted despite of the variance between the charge and the evidence. He stated further that the charge sheet does not disclose the date of the incident. On top of that, the chargesheet shows that the crime scene was Long dong area whilst PW1 told the court that the offence was committed at Makaburini area. He argued further that a

charge was supposed to be amended to clear the variances. He supported his argument with the case of **Mohamed Kamingo v. Republic,** (1980) TLR No. 279.

Coming to the 3rd ground of appeal, the appellant complained that the trial court erred in law to convict him while **Section 127 (2) of the Evidence Act,** Cap 6 R.E 2019 was not complied with. He stated further that there were no prerequisite questions put to the victim to see if he understands the duty of telling the truth, thus his promise was not complete as he was below the age of 14 years. It was the court itself which concluded that a child had promised to tell the truth and not lies. His arguments were supported by a number of cases including the case of **Sadick Athuman v. Republic** (1986) TLR No. 235.

Augmenting on the 4th ground of appeal, the appellant argued that the evidence of PW1 (the victim) was weak, incoherent, and unreliable. He stated further that he was not sure as to where he resides whether it was Muriet Uswahilini or Mazengo street as he mentioned two different places. He argued further that his evidence should not be taken as a gospel as per the case of **Seleman Makumba v. Republic** (2006) TLR No. 379.

Submitting on the 5th and 7th grounds of appeal, the appellant complained that a case was not proved beyond reasonable doubt due to the variance on the prosecution's evidence. First, that PW1 said after her trouser were torn apart he remained with a short while PW2 (victim's mother) said he remained with a boxer. Second, he stated that this offence was fabricated as it was difficult to see bruises as alleged by PW2 while the victim (PW1) said the offence was committed several times. Further to that the victim (PW1) did not state that he was sodomized due to the spank given by the appellant herein. He cited the case of **Abdallah Mussa Mole and Another v. Republic**, Criminal Appeal No. 31 of 2008 and prayed for the court to find no merit on these grounds.

Regarding the 6th ground of appeal, the appellant grieved that the evidence was not properly evaluated. He asserted that while PW2 said the victim was found with a cowherd, the victim said the offence was committed at *Makaburini* area i.e *vichakani*. It was his further argument that even Exhibit P1 was admitted contrary to the law as it was not identified prior to its admission. Further to that there was a change of magistrate from Hon. Kisinda to Hon. Ngoka without assigning any reasons. The appellant complained further that the charge sheet was not

read to him after the closure of the prosecution case and his evidence was never considered by the trial court. He bolstered his arguments with the case of **Musa Daudi v. Republic**, Criminal Appeal No. 15 of 2019 and **Mohamed komungo v. Republic** (1980) TLR 279. In the end he abandons the 1st ground of appeal and prayed for the appeal to be allowed.

On her side, Ms. Neema learned State Attorney supported both conviction and the sentence imposed to the appellant. Responding to the 2nd ground of appeal, she stated that there was no variance between the charge and the evidence of the prosecution. She averred further that the 1st count in the charge sheet, the date is not indicated as it is unknown. However, the 2nd count shows that the offence was committed on 6th day of August, 2018 which was also the date mentioned by the victim (PW1). Further, since the appellant did not cross examine the victim regarding the dates when the offence was committed the same cannot be raised at this stage. She supported her argument with the case of **Emmanuel Mabunga v. Republic**, Criminal Appeal No. 257 of 2019.

Coming to the 3rd ground of appeal, Ms. Neema submitted that **Section 127 (2) of Evidence Act,** was complied with by the trial Magistrate.

She referred this court to page 13 of the proceedings where a child promised to tell the truth. She was of the view that the child was asked prior questions that's why he promised to tell the truth. She added that although there were no questions, but a child promised to tell the truth. She cited the case of **Halfan Rajabu Mohamed v. Republic**, Criminal Appeal No. 281 of 2020 (Unreported) to substantiate her arguments.

Regarding the 4th ground of appeal, Ms. Neema replied that the evidence of PW1 (the victim) was reliable and credible as he promised to tell the truth and he explained what the appellant did to him. Further as the best evidence comes from the victim, he was bold enough to explain how and who committed the offence.

Responding to the 5th and 7th grounds of appeal, Ms. Neema stated that the prosecution gave enough evidence to prove their case. She added that PW1 explained clearly how the appellant removed his trouser and inserted his penis after threatening him. His evidence was supported with the evidence of the doctor who tendered exhibit P2 (PF3) which shows that the victim's anus had bruises. She was of the view that the evidence had no variances as the victim was bold enough to explain what transpired and the best evidence comes from the victim. She cited

the case of **Seleman Makumba v. Republic** (supra) to support her arguments.

Concerning the last ground of appeal, Ms. Neema replied that the judgment of the trial court proved that the evidence was well analysed by the trial court and the evidence of the appellant was considered. And for the issue of change of magistrate the same is curable under **Section 388 (1) of the Criminal Procedure Act**, Cap 20 R.E 2019. She supported her argument with the case of **Chares Yona v. Republic**, Criminal Appeal No. 79 of 2019 and prayed for the appeal to be dismissed.

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

Having considered the submissions from the appellant and the counsel for the respondent the issue for determination is whether the prosecution case was proved beyond reasonable doubt against the appellant.

Starting with the 3rd grounds of appeal, the appellant complained that **Section 127 (2) of the Evidence Act**, Cap 6 R.E 2019 was not complied with as no prerequisite questions were asked to the victim to see if he understands the meaning of oath. On her side, Ms. Neema

argued that although the records are silent, the questions were asked to the victim who promised to tell the truth as per the law.

Section 127 (2) of Cap 6 R.E 2019 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."*

The above provision requires the trial court to satisfy itself that a child witness understands the meaning of oath and the duty to speak the truth before giving his/her evidence. The records of the trial court on 4/3/2019 shows that and I will quote:

PW1: J.E (Name not disclosed)

- *Resident of Uswahilini*
- *10 years old*
- *A student*
- *Chirstian*
- *Ira*

Court: *From the look of the witness and his age, since he is a child of a tender age, this court invoke the provision of section 127 of TEA as amended by Written Laws, Act No. 4, 2016 to obtain a promise that he will tell the truth.*

Witness: *I promise to tell the truth"*

Looking at the above quotation, the record speaks by itself that a child promised to tell the truth but there were no prerequisite questions asked to the victim to assist the trial magistrate to determine as to whether or not the child witness understands the nature of oath. The procedure on how to comply with the above provision has been deliberated by the Court of Appeal in a number of cases. In the case of **Issa Salum Nambaluka v. The Republic**, Criminal Appeal No. 272 of 2018 (CAT at Mtwara, Unreported) the court had this to say:

> *"It is for this reason that in the case of Geoffrey Wilson v. Republic, 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 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 to tell lies."*

Guided by the cited authority, it goes without saying that the trial magistrate in the case at hand contravened the above provision. The record shows that PW1 promised to tell the truth, however, the record does not reflect that few questions were asked to him to see if he

understands the meaning of oath. It was the court which stated that since the child is of tender age, it will obtain a promise to tell the truth only and it did so. In the circumstances therefore, I agree with the appellant in this case, that the procedure used to take PW1's evidence contravened the provisions of **Section 127 (2)** of the Evidence Act. For these reasons, I allow the 3rd ground of appeal. Consequently, the evidence of PW1 which was received in violation of the provisions of **Section 127(2)** of the Evidence Act is hereby expunged from the record.

Having expunged the evidence of PW1 this court will now determine the remaining evidence if it suffices to prove the charge of unnatural offence against the appellant. Starting with the evidence of the PW2 and PW3 who are the parent of the victim, their evidence was just hearsay evidence as no one witnessed the commission of the offence. They both stated that "*after the victim was found in the evening of 6/8/2018 and being taken to Unga Limited police station he mentioned the 2nd accused person as the one who used to hold his hand and took him to the appellant herein to be sodomized.*" Their evidence was purely hearsay and regarding the hearsay evidence **Section 62 (1) (a) of the Evidence Act**, Cap 6 R.E 2019 provides that:

"1. *Oral evidence must, in all cases whatever, be direct; that is to say—*

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;"

See also the case of **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 (CAT-Unreported). As it is clearly stated in the cited provision that oral evidence must in all cases be direct. Whatever that is not direct is hearsay and therefore the same is not admissible since direct evidence is the best evidence. Therefore, the evidence of PW2, PW3, PW4, PW5 and PW6 is indirect evidence, the same is required to be supported by other evidence particularly the evidence of PW1 (the victim) and the same has already been expunged from the records.

For those reasons, this court is of the firm view that there is nothing on record from the prosecution side that has established a case sufficiently enough to require this court to ground conviction upon the appellant herein. Thus, I feel not obliged to test the rest of the grounds of appeal since the 3rd ground suffices to dispose of the entire appeal.

In the event, on account of what I have explored to discuss herein above, this court allows the appeal, quash the conviction, and set aside

the sentence. It is ordered that, the appellant be released from prison unless he is being held for some other lawful cause.

Ordered accordingly.

DATED at **ARUSHA** this 21st day of August, 2023.

N.R. MWASEBA

JUDGE