IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 39 OF 2022

(Arising from the District Court of Shinyanga, Original Criminal Case No. 65/2021)

KENEDY s/o MOTOCHINI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

24TH July & 21st August 2023

F. H. MAHIMBALI, J

The appellant in this case one **KENEDY s/o MOTOCHINI** was convicted of four offences of unnatural offence Contrary to Section 154(1)(a) of the Penal Code Cap 16, R.E 2019 and consequently sentenced to life imprisonment for each sentence as convicted. I am not sure whether the name ***MOTOCHINI*** being the appellant's name has any connection with these accusations he was charged with, nevertheless sounds as if collocating something unusual.

It was alleged by the prosecution at the trial court that the appellant had carnal knowledge against the order of nature of four boys (who age between 11 and 13 years old) and were pupils at Iselamaganzi Primary

school. As the appellant denied the allegations, the prosecution side paraded a total of seven witnesses (the four victims as PW3, PW4, PW5 and PW6), Social Welfare officer – PW1, Head Teacher - PW2 and Doctor – PW7. The appellant had fended for himself as he had no witnesses to call.

Upon being satisfied by the prosecution's evidence, the trial court made a finding that the appellant is guilty of all four offences, thus convicted him in all the charged offences and consequently sentenced him to life imprisonment. The appellant is dissatisfied with the said findings of the trial court, thus this appeal preferred on three grounds, which in essence all boil into one main cause that the prosecution's evidence leading to his conviction was legally insufficient to maintain his conviction and thus the awarded sentence.

During the hearing of appeal, the appellant was unrepresented, whereas for the respondent, Ms Shani being assisted by Ms Mboneke both learned state attorneys resisted the appeal.

On his part, the appellant had nothing material to add but just prayed to adopt his grounds of appeal and pressed that through them, his appeal be allowed and that he be set at liberty.

In resisting the appeal, Ms. Shani learned state attorney responded to the said grounds of appeal jointly. She contended that as per evidence in record, the victims fully established that it was the appellant who knew them carnally against the order of their nature. Considering the cherishing principle in sexual offences that the best evidence comes from the victim (**Selemani Makumba's case**), it is her humble submission that what the victims testified in this case was not hearsay evidence but direct evidence pursuant to section 62 of the TEA.

Relying on the testimonies of the victim boys (PW3, PW4, PW5 and PW6) as enshrined into the typed proceedings in pages 15, 19, 21 and 24 establish how each one was carnally known by the appellant against the order of each one's nature. She added further that, apart from these victims, PW1, PW2 and PW7 clearly corroborated what befell the victims in this case and on that basis, she contended that the prosecution's case was dully established as per law.

On the other hand, she challenged the appellant's evidence at the trial court as didn't reasonably shake the prosecution's evidence. As there were no any questions asked on that aspect by the appellant, suggests acceptance relying on the decision of the Court of Appeal in the case of

John Shini vs. Rep, Criminal Appeal No. 573 of 2016, CAT at Shinyanga at pages 18 -19.

On that basis, she concluded that the prosecution's case was fully established as per law and that the appellant was rightly sentenced. She relied support in the case of **Tafifu Hassan @ Gumbe vs. The Republic**, Criminal Appeal No. 436 of 2017 CAT at page 18-19. With all these submissions, she prayed that this appeal be dismissed in its entirety for being brought without sufficient cause.

The appellant, in his rejoinder reiterated his submission in chief he had nothing more to add, he prayed for his ground of appeal be accorded weight and that he be acquitted.

I have thoroughly gone through the petition of appeal, records of the trial Court and submission by both parties and keenly scanned the evidence in it. The vital question to consider is whether the appeal is merited.

Before considering the merits of the appeal, in my digest to the testimony of the victims (PW3, PW4, PW5 and PW6), I had noticed the procedural issue prior to the reception of their evidence, them being children of tender age. Whereas the preliminary interrogations suggest

that the said children knew the nature of oath, the trial magistrate suo motto substituted that finding to that of promise of telling truth and then proceeded to record their evidence without taking an oath neither evidence that the said witnesses promised to tell the truth as per law. I then asked Ms Shani, learned state attorney whether that was proper as per law and whether the two procedures/findings mean the same and can they be used interchangeably?

On this, Ms Shani in her response, first acknowledged that there is a procedural irregularity by the trial magistrate on the findings made to each witness of tender age (victim) on competence to testify and the final course she had undertaken to do. She appreciated that whereas the said children seemed to understand the nature of oath, the trial magistrate substituted it with the promise to tell the truth. Despite this observation, Ms Shani was of the view that, since both, the testimony under oath and the promise to tell the truth in respect of the testimony of the child of tender age serve the same purpose, that the mixing done didn't vitiate the proceedings. Had there not been held such preliminary proceedings to establish the competence of the said children as witnesses, the proceedings would have been vitiated. In the circumstance of this

case, despite such a mixture, yet the proceedings are still pure and are actionable, she insisted.

The appellant had nothing to subscribe on that but just insisted of his acquittal.

In my understanding of section 127 (4) of the Evidence Act supra, 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. One is not exempted to give his testimony on oath on a mere fact of being a child. The said s. 198 (i) of CPA provides:

"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 of tender age 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 to section 198 (1) of the CPA 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. That means, as per law, a child of tender age if does not understand the nature of oath and cannot promise to tell truth to court, he/she is not competent to testify.

The records must however be clear as to how the Court arrived into such choice. In that absence, there is no any justification in any course taken by the trial court for a child of tender age to testify either on oath, affirmation or on promise to tell the truth.

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 a

course without first examining whether the said child witness of tender age understands the nature of oath and give evidence on oath or otherwise as per law.

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 (few pertinent questions so as to determine whether or not the children witnesses understood the nature of oath) was conducted before PW3, PW4, PW5 and PW6 gave their testimonies. Surprisingly, at the end of each inquiry, the trial magistrate made a very different conclusion,

unsupported by the record. For example, at page 18 of the typed proceedings in respect of PW3 it is recorded:

> *"The child understands the meaning of an oath and possesses knowledge and understand the duty of speaking the truth hence he has to proceed and testify. PW3 (name withheld), 12yrs old, Sukuma, a student of Iselamagazi Primary School, Standard five, Christian, promises to tell the truth, states....."*

The similar version is pasted for PW4, PW5 and PW6. There is 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 PW3, PW4, PW5 and PW6 fitted into the exemption of giving evidence without oath.

The argument by Ms Shani would be relevant, had there been recorded words visible in record from the said witnesses of tender age that they had also promised to tell the truth. As such words are missing but only the utterance by the trial magistrate that the said witness promised to tell the truth, we cannot assume. Court record being a serious document, should speak by itself in what actually transpired before the court.

Since there was no such promise said by the said children, the trial magistrate grossly erred in my considered view to put words on their behalf instead and thus vitiated the proceedings. By the way, it be noted that, a promise to tell the truth is not equal to taking oath. The latter in my considered view carries more weight than the former in the sense that not every promise is true, but not an oath. The Osborn's Concise Law Dictionary, Eighth Edition, defines the two words in the following manner:

> ***Oath:*** *A religious assertion by which the party/person calls his God to witness that what he says is the truth, or that what he promises to do he will do.*
>
> ***Promise****: The expression of an intention to do or forbear from some act.*

Since the law presumes that evidence given on oath is weightier as no man will forswear himself for any worldly thing. However, for children of tender age, their testimony can be acted upon even if one doesn't know the nature of oath, on promise that he will tell the truth. Therefore, in the circumstances of this case where the said witnesses understood the nature of oath as recorded by the trial magistrate, there was no way their evidences could be taken in another manner preferred by her than the

law. The relevant law which is section 127(1) and (2) of the Tanzania Evidence Act, provides:

> *127.-(1) Every person shall be competent to testify unless the court considers that he is* ***incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age****, extreme old age, disease (whether of body or mind) or any other similar cause.*
>
> *(2) 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*** [Emphasis added].

As what is the way forward in that respect, I am of the considered view that there was no any evidence given by the said witnesses as what was recorded is a nullity as per law. I therefore nullify all the evidence in respect of the testimony of PW3, PW4, PW5 and PW6.

With all these observations, I find this appeal to have been brought with sufficient cause, I allow it but with an order of retrial of the

case expeditiously but before another magistrate with competent jurisdiction.

DATED at SHINYANGA this 21st day of August, 2023.

F.H. Mahimbali
Judge

Judgment delivered today on the **21st day of August 2023** in the presence of the appellant and respondent being represented by Mr. Goodluck Saguya, learned State Attorney and Ms Beatrice, RMA, present in Chamber Court.

Right of appeal explained.

THE HIGH COURT OF TANZANIA

F.H. MAHIMBALI
JUDGE
21/8/2023