IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 118 OF 2023

(Arising from the decision of the District Court of Temeke at Temeke dated on the 21st day of April 2023 in Criminal Case No.40 of 2023 Before Hon. J.H Mwankenja)

MOHAMED HALIFA MTILA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

12th July & 30th August 2023

MWANGA, J.

The appellant, **MOHAMED HALIFA MTILA**, appeared before the District Court of Temeke at Temeke on 19th January 2022 to answer a charge of unnatural offense contrary to Section 154(1), (a) and (2) of the Penal Code, Cap. 16 [R.E 2019].

It was alleged that on diverse dates from November 2021 to December 2021 at the Malela Toangoma area within Temeke District in Dar

es Salaam Region, the appellant did have carnal knowledge of a boy of 9 years against the order of nature whose identity should be concealed.

He denied the charges. After his trial, he was found guilty as charged and convicted accordingly. Therefore, he was sentenced to serve life imprisonment.

Believing innocent, he lodged this appeal against conviction and sentence to this court on the following grounds:

1. That the learned trial court magistrate erred in law and fact in convicting the appellant based on the evidence of PW1 (victim), whose Evidence was irregularly obtained.
2. That the learned trial court magistrate erred in law and fact when he failed to analyze and adequately evaluate evidence that was tendered before the court and eventually convicted and sentenced the appellant
3. That the learned trial court magistrate erred in law when he violated the criminal procedure and eventually convicted and sentenced the appellant based on an irregular preliminary hearing.

4. That the learned trial court magistrate erred in law and fact when they failed to rule out that the appellant herein was improperly identified.

Advocate Elfasi Rwegashora represented the appellant. The republic, represented by Ms. Nura Manja, learned State Attorney.

The learned counsel, Mr. Elfasi, started arguing the second ground of appeal. According to him, the evidence of the trial court was not analyzed. He contended that the evidence of PW1 was taken without caution or warning because the witness, PW1, was not credible. The counsel referred to the evidence of PW2 who stated that it is true that the victim was penetrated by his fellow student at school. He added that, on page 24 of the proceedings, it is shown that the perpetrator was studying at Toangoma Primary School. Reference was also made on page 21, where PW2 stated that he lied earlier. In PW4, a doctor noted that the school in which the victim was studying had the behaviour of committing an unnatural offense. Further, on page 11, the victim agrees that some fellow students were arrested for such conduct. Hence, it was wrong for the court to hold that PW1 was credible and reliable without any corroboration from other witnesses. It was added that the victim failed to name the appellant

earlier. The counsel referred to the case of **Fahad Khalifa Vs Republic,** Criminal Appeal No. 573 of 2020(unreported) on page 11, where the court held that failure to name the appellant at an earlier stage creates doubt. He submitted that five days had passed after the incident had been reported. See pages 24 and 27 of the proceedings.

Furthermore, the counsel argued that the court did not consider that the material witness," the Chairman who identified the appellant," was not called to testify. Hence, he invited this court to draw adverse inferences. The counsel supported his contention with the case of **Aziz Abdalla vs R,** 1991[TLR] 71.

In reply, the learned State Attorney Nura Manja disagreed with the counsel for the appellant. **First**, she supported the conviction and sentence. She submitted that she told the court that the victim was the one who told him and that the appellant had canal knowledge of him. According to her, it is true that PW1 admitted that such conduct occurred in their school. However, he identified the appellant as the person responsible for the acts of unnatural offense, and the same was corroborated by the medical doctor, PW3. It was her submission that the

victim delayed revealing the incident because of the threat posed to him by the appellant.

As to why the "chairman" was not called, Ms. Nura cited the provision of section 143 of the Evidence Act, stating that no number of witnesses is required to prove a particular fact. According to her, the "ten cell leader, Mwenyekiti wa mtaa," and the victim's young mother were told by the victim about the appellant's involvement.

In the fourth ground of appeal, the counsel talked about identifying the appellant. He contended that Mwenyekiti wa Serikali za Mitaa identified the appellant, not the victim. He also argued that the victim identified the appellant at the dock and not at the identification parade as the law requires. He referred to the cited case of **Fahad Khalifa vs. Republic**(supra).

Ms. Nura responded that since the victim knew the appellant, there was no need for an identification parade.

In the first ground of appeal, the counsel contended that the law under section 127(2) of the CPA was not complied with. According to him, the witness promised to tell the truth only. At the same time, the law requires

him to promise not to tell lies. The counsel referred to the case of **Nassir Hemed Hassan vs R,** Criminal Appeal No. 243 of 2020(HCT).

In reply, Ms. Nura submitted that the fact that the victim promised to tell the truth was enough to assert that the provision of section 127 was complied with. She cited the case of **Mzee Ally Meinyi Mkuu @ Babu Sea Vs R**, Criminal Appeal No. 99 of 2017.

In retort, Mr. Elfasi insisted that the best evidence of sexual offense comes from the victim. The counsel cited the case of **Hamis Halfan Dauda vs R,** Criminal Appeal No. 231 of 2009(unreported). It was his submission that, in that view, the credibility and reliability of the evidence must be considered and taken with great caution and care. He insisted that the one who identified the appellant was a crucial witness. He said the ten-cell leader was absent during the appellant's arrest. He argued further that the fact that they knew each other is not reflected in the proceedings.

I have reviewed the trial court's proceedings, submissions, and the relevant cited authorities. To start with the first ground of appeal, the law is now settled. The disputed compliance provisions of Section 127(2) of the Evidence Act, Cap.6 R.E 2019, read:

"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 and not to tell any lies."***

The law above clearly states that the promise to tell the truth and not lies for a child of tender age is mandatory before receiving the evidence. The requirement of the promise to the Court to tell the truth and not tell lies comes in after the Court is satisfied that being a child of tender age does not understand the nature of an oath and the duty of telling the truth.

The Court of Appeal has given the clear position when a child of tender age promises to tell the truth but fails to promise to tell lies. It is now settled that, the promise to tell the truth to the court alone connotes not to tell lies. In **Mathayo Laurence William Mollel vs. The Republic**, Criminal Appeal No. 53 of 2020 (unreported), the court had this to say;

> ***"The appellant also argued that the child witnesses' promise was incomplete for promising only to tell the truth and omitted to undertake not to tell lies. We find difficulties in agreeing with him. We understand the legislature used the words "promise to tell the truth to the court and not to tell lies." We think tautology is evident in the phrase, for, in our view, 'to tell the truth" means "not to tell lies." So, a person who promises to tell the truth is, in***

effect, promising not to tell lies. The tautology in the subsection is, in our opinion, a drafting inadvertency. We thus find no substance in the first ground of appeal and dismiss it".

Given the above, the provision of section 127(2) of the Evidence Act has been complied with. On page 8 of the trial court proceedings, PW1 promised to speak the truth. Therefore, this ground of appeal lacks merit.

The second ground of appeal was failure to analyze and adequately evaluate evidence tendered before the court and eventually convicted and sentenced the appellant. Evidence of the victim PW1, on pages 9 and 10 of the trial court proceedings, the victim identified the appellant by the single name of Mussa. He also stated the place and number of events the appellant sodomized him. He also mentioned where the incident occurred and that he was given money after the event. and that he sodomized him, he felt pain, and he was bleeding in his anus. At the same page, he narrated that; ***"mshitakiwa aliniita mimi twende kwenye nyumba tukacheze. Nyumba ilikuwa haina bati na dilisha na mlango. Akaniambia nivue nguo na yeye akavua nguo. Nikavua nguo nikabaki uchi na yeye akavua nguo zote,akaniambia niiname akachukua mdudu wake akaingiza kwenye matako akaniinamisha, aliniingiza huku nyuma ninapotoa mavi"***

The unofficial translation of the above quotation is that the appellant called him at the unfinished house with no windows, doors, or iron sheets. He told him to undress, which he did. The appellant also undressed, and both remained naked. The appellant bent him down and inserted his penis in the victim's anus. During cross-examination, the victim told the appellant he knew and identified him. They even had a conversation that the appellant was not a student. In addition, it appears that, even when the victim was recalled for further cross-examination, he maintained his testimony and insisted that the appellant sodomized him five times. Lastly, he told the court that the appellant threatened not to disclose the incident. PW4, a doctor who examined the victim, testified that the victim was penetrated.

In light of the above testimonies of the victim, I am satisfied that he is telling nothing but the truth. In **Goodluck Kyando Versus R (2006) TLR, 363,** the court held that;

> ***"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."***

I have found no reason to fault the victim's evidence, PW1. Therefore, the arguments that, in the victim's school, students sodomize each other and that a ten-cell leader or chairman of the street was not called to testify, to me, does not hold water. The law is clear that it is essential to consider the witness's credibility and not the number of witnesses called by the prosecution. It is upon the prosecution to call its witnesses and not the defence.

In the case of **Joshua Chipahna@Kidyani Versus, The Republic**, Criminal Appeal Case No. 336 OF 2020the court had this to say;

> ***"The weight of evidence to prove a fact does not depend on the number of witnesses. Section 143 of the Evidence Act, which Ms. Gwaltu referred us to, even a single witness can prove any fact. This Court said in MWITA KIGUMBE MWITA & MAGIGE NYAKIHA MARWA V. R, CRIMINAL APPEAL NO. 63 OF 2015 (TANZLII), in each case, the Court looks for quality, not the quantity of the evidence placed before it. The best test for the quality of any evidence is its credibility. It was for the prosecution to determine which witness should prove whatever fact it wanted. Therefore, it was not up to the appellant to direct the prosecution to call either a police officer or a social welfare worker to testify".***

In light of the above, and as rightly contended by the learned State Attorney, there was no need to identify the appellant because the victim knew him by his name. Likewise, even though the victim mentioned that those conducted mainly occurred in their street or school, he maintained the position that the appellant sodomized him and no more.

All that is stated was evaluated and analyzed by the trial court. On page 12 of the typed judgment, the trial magistrate noted that the victim knows the appellant and the place where the offense was committed. On pages 13,14 and 15, the trial court warned itself about evaluating the evidence of both sides. He considered evidence of the defence and then disregarded it after proper scrutiny or evaluation. Basing on Section 127(6) of the Evidence Act stipulates that:

> ***"where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or a victim of the sexual offence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be, the victim of a sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if, for reasons to be recorded in the***

proceedings, the court is satisfied that the child of tender years or victim of the sexual offence is telling nothing but the truth."

That being the case, 2nd and 3rd grounds. Of appeal lacks merits.

The rule stems from the case of **Mgenda Paul and Another Versus Republic (1993TLR 219,** as the Court held that;

"For any case to be taken to have been proved beyond a reasonable doubt, its evidence must be strong against the accused person to leave a remote possibility in his favor which can easily be dismissed.".

As a result, I am confident that the appeal lacks merit. In that regard, the conviction and sentence of the trial court are upheld, and the appeal is, at this moment, dismissed.

Order accordingly.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

H. R. MWANGA

JUDGE

30/08/2023

COURT: Judgment delivered in Chambers this 30th August 2023 in the presence of Mr. Emmanuel Maleko, learned Senior State Attorney, and Advocate Elfasi Rwegashora for the Appellant.

H. R. MWANGA

JUDGE

30/08/2023