IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 24 OF 2023

(Originating from Criminal Case No. 215 of 2022 of Moshi District Moshi)

DEOGRATIUS ANTIPAS SILAYO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

10/08/2023 & 15/09/2023

SIMFUKWE, J.

Before the District Court of Moshi (the trial court) the appellant herein together with one Luca Semboji Mlauwasa were charged and convicted with an offence of unnatural offence contrary to **section 154 (1) (a) and (2) of the Penal Code** [Cap 16 R.E. 2019]. Both of them were sentenced to thirty (30) years imprisonment.

It was alleged in the particulars of the offence that on 10th day of May, 2022 at Uchira area within the District of Moshi in Kilimanjaro region, the accuseds jointly and together did have carnal knowledge to one Charles Kimambi Nguma against the order of nature.

Briefly, it was asserted by the prosecution that the victim is imbecile since his birth. PW1 who alleged to be the victim's father noticed that his child's behaviour changed suddenly. PW1 decided to go to the police station and asked them to interrogate the victim. Upon interrogation, the victim

revealed that three people among them being the appellant Deogratius, used to give him alcohol and sodomise him. The police who interrogated the victim advised PW1 to report the matter at Himo police station. At the police station, the victim was taken to hospital and was examined by PW3 the doctor whose evidence was to the effect that upon examination he found that the victim was sodomised.

In their defence, the appellant and his fellow denied to have committed the offence in question.

The trial court was satisfied that the prosecution case was proved beyond reasonable doubt. It convicted the appellant and his co-accused and sentenced them to serve 30 years in prison. The appellant was aggrieved. He filed this appeal on the following grounds of appeal:

1. *That, the trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubt.*
2. *That, the trial court erred in law and fact by convicting the Appellant based on the evidence of hearsay by the PW1 (sic) and contradictory.*
3. *That the trial Court erred in law and fact by relying insufficiency evidence of PW2 to convict the Appellant. (sic)*

At the hearing of the appeal which proceeded orally, the appellant was represented by advocate Julius Lukumay while the respondent was represented by Mr. John Mgave, the learned State Attorney.

Mr. Lukumay opted to argue the first and second grounds of appeal jointly. Under these grounds, the learned advocate raised seven arguments as follows:

The first argument was that the trial magistrate did not convict the appellant as required by the law. Mr. Lukumay specified that any judgment must comply with **section 235(1)** and **section 312(2) of the Criminal Procedure Act** [Cap 20 R.E 2022]; the provisions which were not adhered to by the trial court. In respect of **section 312 of the Criminal Procedure Act** (supra), the learned advocate argued that the magistrate was required to specify that the accused person is convicted and sentenced under which law. He referred to page 8 of the trial court's judgment which reads that:

> *"I hereby convict both accused persons from the offence charged with unnatural offence contrary to section 154(1)(a) of the Penal Code, Cap 16 R.E 2022. And there convict them forthwith pursuant to section 235(1) of the Criminal Procedure Act, Cap 20 R.E 2022."*

Mr. Lukumay believed that **section 154(1)(a) of the Penal Code** is the section that establishes the offence of unnatural offence but it does not provide for punishment. He suggested that that the trial magistrate was expected to cite **section 154(1)(a) and (c) of the Penal Code**. It was Mr. Lukumay's opinion that since the provision of punishment was not specified, the whole judgment become null and void as there is no backing law used to convict and sentence the appellant to 30 years imprisonment. He added that **section 235(1)** which was cited should be read together with **section 312(2) of the Criminal Procedure Act** (supra) as they are compatible. He referred to the case of **Modestus Samwel Kawonga vs Republic**, **Criminal Appeal No. 31 of 2020 (Hc)** and insisted that the appellants were not properly convicted.

On the second argument, Mr. Lukumay argued that evidence of PW2 was not taken in compliance of the law. He contended that since at page 9 of the typed proceedings, the trial magistrate recorded the evidence of PW2 as a person aged 11 years, thus, she was expected to record it in compliance to **section 127(2) of the Evidence Act Cap 6 R.E 2022** as the victim was of tender age. That, since PW2 gave evidence under oath, the trial magistrate was supposed to ascertain that the said child understood the meaning of oath before being sworn. The learned advocate elaborated that the trial magistrate did not record anywhere if she asked simple questions to the child in order to know whether he understood the meaning of oath. He referred to the case of **Amani Fungabikasi vs Republic, Criminal Appeal No 270 of 2008**, at page 6 to 7 which stated that if the child gives his evidence under oath, he must be asked simple questions. That, if the child witness is unsworn, then the court must prove that what the child is telling is nothing but the truth.

Mr. Lukumay continued to submit that according to page 6 of the trial court's judgment, the magistrate said that the best evidence in sexual offences comes from the victim pursuant to **section 127(6) of the Evidence Act**. Mr. Lukumay's question was whether **section 127(6) of the Evidence Act** override **section 127(2) of the same Act?** He was of the view that **section 127(6)** is a general section notwithstanding whether the victim is a child or an adult while **section 127(2)** is the specific section which was not complied with. Therefore, PW2 did not promise to tell the truth before the court before giving his testimony. Thus, his evidence has no any evidential value.

Under the third argument, the learned advocate condemned the prosecution for failure to call material witnesses. He alleged that at page 5 of the judgment, the trial court mentioned a person called Inspector Msechu who never appeared before the trial court. It was the opinion of Mr. Msechu that the fact that the trial court relied on evidence of a person who never appeared before the court to give evidence and the appellant be given opportunity to cross examine him, it has prejudiced the right of the appellant.

Also, Mr. Lukumay argued that one Eugene Nguma who was referred by PW3 in his evidence was not called. He insisted that failure to call the said material witnesses is fatal. He supported his argument with the case of **Sigfrid Venance Marandu vs Republic,** Criminal Appeal No. 31 of 2021 (HC) at page 8 and the case of **Aboubakar Msafiri vs Republic**, Criminal Appeal No. 378 of 2017 (CAT). He stressed that failure of the prosecution to call material witness was fatal and prejudiced the appellant.

Fourthly, Mr. Lukumay submitted that the appellant was not properly identified. He referred to page 10 of the proceedings where PW2 said on 10th May 2022 at 21:00hrs he was called by the appellant and taken to Chang'aa alcohol. He argued that it was expected for the trial court to prove visual identification of the appellant by PW2. He cited the case of **Said Chaly Scania vs Republic**, Criminal Appeal No. 69 of 2005, CAT at page 7 to 8 to support his point.

Mr. Lukumay continued to state that according to PW2 it was night and there was no light but they were surprised the way the trial magistrate at page 6 of her judgment drew her own evidence which had never been

said by PW2. That, the trial magistrate stated that there was light while PW2 said that there was no light. It is not known where the trial magistrate construed such evidence. It was cemented that the appellant was not properly identified and the case of **Waziri Amani** was misinterpreted.

On the fifth argument, the learned advocate argued that evidence by the prosecution was contradictory and inconsistent. Elaborating this point, Mr. Lukumay submitted that PW1 referred Inspector Msechu as the person who interrogated the victim. PW1 stated further that after interrogation, Inspector Msechu directed them to report the matter at Himo Police Station. The noted contradiction is which station was Inspector Msechu stationed? The learned advocate said that PW2 never mentioned being taken to Himo police station and he never said that he was interrogated by inspector Msechu.

Furthermore, Mr. Lukumay averred that at page 9 of the proceedings, PW2 told the trial court that he went home without clothes and that at home he was taken to hospital by his mother but his mother never appeared before the court. Also, it was noted that PW1 never said that the child was sodomised but he said the behaviour of the child changed suddenly.

Also, Mr. Lukumay observed that according to PW2, he said he was sodomised on 10th May 2022 while his father reported the matter at the police station on 13th May 2022.

Another noted discrepancy is on the age of the victim. That, PW1 who introduced himself as the father said that the victim was 13 years while the victim himself gave his evidence under 11 years old.

From the above noted contradictions, the learned advocate believed that the prosecution failed to prove their case beyond reasonable doubts. He supported his argument with the case of **Magendo Paul and another vs Republic [1993] TLR 219.** He prayed the court to disregard the evidence of PW1 and PW2 since it did not prove the case beyond reasonable doubt.

On the 6th argument, Mr. Lukumay submitted that evidence of PW1 was hearsay. Thus, his evidence was not supposed to be relied upon by the trial magistrate.

His last argument was that evidence of PW3 did not prove the offence of unnatural offence because he tendered exhibit P1 (PF3) which showed that the examination of the victim was done on 13th May 2022 three days after the occurrence of the offence. He opined that examination done after three days from the date of the alleged offence cannot reveal anything pertinent to prove sodomy. He cited the case of **Mtasigwa Gasper vs Republic,** Criminal Appeal No. 50 of 2021 (HC) at page 8 which held that:

> *"The examination done after three days from the date of the alleged rape cannot reveal anything pertinent to prove rape."*

Based on what he submitted, Mr. Lukumay prayed the court to expunge exhibit P1 because it was taken contrary to the law.

Supporting the 3rd ground of appeal that the trial court erred in law and fact by relying on insufficient evidence of PW2 to convict and sentence the appellant; Mr. Lukumay submitted that according to the evidence of PW1 at page 8 of the trial court proceedings the victim was imbecile; meaning

a person of unsound mind since he was born. Mr. Lukumay was of the view that if the victim was imbecile his evidence must be in doubt. That, since the victim was the only witness whose evidence was trusted by the trial court, his evidence was to be corroborated so as to prove to the trial court that what was said by the person of unsound mind was nothing but the truth.

It was further submitted that the appellant is a husband and father of two children which means convicting him on weak evidence is to prejudice even those who depend on him.

In his final remarks, Mr. Lukumay prayed this court to allow the appeal and acquit the appellant because the case against him was not proved by the prosecution beyond reasonable doubts.

Replying the above submission; starting with the first argument that the appellant was convicted contrary to **section 235 of the Criminal Procedure Act** (supra), Mr. Mgave submitted that, at page 8 of the judgment the trial magistrate mentioned both accused persons and the offence of which they were convicted.

However, the learned State Attorney agreed that **section 312 of the Criminal Procedure ct** (supra) was violated as the trial court did not cite the provision under which the appellant was sentenced. He also notified the court that the trial court erred by sentencing the appellant to thirty years imprisonment instead of life imprisonment which prejudiced the prosecution.

Responding to the argument that evidence of PW2 was taken contrary to **section 127(2) of the Evidence Act** (supra), Mr. Mgave supported Mr.

Lukumay's argument. He referred to the case of **Godfrey Wilson vs Republic,** Criminal Appeal No 168 of 2018 (CAT) which held that:

> *"Prior to recording evidence of the child of tender age, the court should ask questions to the said witness child in order to test whether or not he/she understands the meaning of oath, if the child does not understand the meaning of oath; he should promise to the court to tell the truth and not lies. It is mandatory that such promise should be reflected in the record of the trial court. If such promise is not reflected in the proceedings of the trial court, then it is a big block on the prosecution case. The inference drawn against the prosecution is that there was no such promise made. And if there was no such undertaking, then the provision of section 127(2) was faulted. That irregularity is fatal and incurable which renders evidence of that child of no evidential value. Thus, it is as if the child never testified at all."*

While making reference to page 9 of the typed proceedings of the trial court, Mr. Mgave insisted that the provision of **section 127(2) of the Evidence Act** (supra) was not complied with and it occasioned injustice to the appellant.

Contesting the argument that the prosecution failed to call material witnesses, Mr. Mgave replied to the effect that the prosecution is not mandatorily required to call all witnesses to testify. That, **section 143 of the Evidence Act** (supra) provides that there is no specific number of witnesses required to prove the prosecution case. That, what is required is quality of evidence and credibility of witnesses. Thus, the prosecution summoned witnesses whose evidence was believed to be credible.

On the fourth argument which concerns identification of the appellant, Mr. Mgave conceded that the appellant was not properly identified. That, at page 9 of the proceedings the victim stated that it was dark but he identified them. The victim stated further that there was no light in Manuu's shop but he saw them clearly through the light they had. To support the argument, the learned State Attorney cited the case of **Masolwa s/o Samwel vs Republic,** Criminal Appeal No. 348 of 2016 (CAT) and said that the victim was supposed to state the intensity of the light used to identify the appellant even if he knew the appellant. That, the appellant was not properly identified because the victim did not state the type of the light since at night mistaken identification is possible. For that reason, the learned State Attorney agreed that the prosecution failed to prove its case beyond reasonable doubts.

On the fifth point of argument in respect of contradiction of evidence of PW1 and PW2 particularly on the age of the victim, though Mr. Mgave agreed that there was such contradiction, he was of the view that the same did not prejudice the appellant. He explained that PW1 stated that the age of PW2 was 35 years, while PW2 at page 9 stated that he was 11 years. Mr. Mgave was of the opinion that the contradiction was minor and curable under **section 388 of the Criminal Procedure Act** (supra).

With regard to the date, Mr. Mgave submitted that there is no contradiction since PW2 said that he was sodomised on 10th May 2022 while PW1 reported to the police station on 13th May 2022

Responding to the argument that evidence of PW3 did not prove the prosecution case, Mr. Mgave declared that evidence of PW3 which concerned medical examination (PF3) was there to show that there was

sexual intercourse and not that there was rape or unnatural offence. That, PW3's evidence corroborated the evidence of PW1 and PW2. However, Mr. Mgave was of the opinion that since the evidence of PW2 was taken in contravention of **section 127(2),** then evidence of PW3 is of no essence.

On the last point, the learned State Attorney reiterated that evidence of PW2 was taken in contravention of **section 127(2) of the Evidence Act** (supra).

In his conclusion, Mr. Mgave prayed the appeal to be allowed to the extent of supported grounds.

In rejoinder, Mr. Lukumay reiterated his submission in chief.

Having gone through the grounds of appeal, submissions of both parties, as well as the trial court's records and considering the fact that the learned State Attorney for the respondent to the great extent supported the appeal, the issue for determination based on the noted irregularities is **whether this appeal has merit?**

On the 1st ground of appeal particularly under the argument of identification of the appellant, the parties conceded that the appellant was not properly identified since the incidence was alleged to have happened at 21:00hrs and the victim did not explain how he identified the appellants.

To ascertain what has been conceded, I revisited the proceedings of the trial court. At page 9 of the typed proceedings, PW2 the victim had this to say:

> *"I remember on 10/05/2022 at 21:00 hours I was at Uchira area. I was called by Deogratius the 1st accused (pointed to 1st accused), I was in the Manuu shop. Deo and Manuu*

and Lucas. Lucas is the 2nd accused in this court. They took me to chang'aa alcohol. they gave me chang'aa alcohol "Gongo." They gave me a bottle of gongo. I drink the whole alcohol then they took me to Manuu's house, Deo, Luca and Manuu. At Manuus house they undressed me then they ***started kazi in my anus "walinifira wote."***

It was night so I identify (sic) them but there was darkness. There is no light in the shop of Manuu, but I saw them clearly through the light which they have."

The learned trial magistrate at page 5 to 6 of her judgment was of the opinion that the appellant was well identified. At page 6 she stated that:

"As to this case in my hands, the evidence which has been explained above versus the criteria laid down in ***Waziri Amani****, however the incidence took place at night and there was light, which enable the victim to drink alcohol with accuseds at Manu shop. Later to the place where there was light, the accuseds were properly identified by the victim.*

With due respect to the learned trial magistrate, what she reported was not stated by the victim. The trial magistrate stated words which the victim did not say in his testimony. According to the victim's evidence as quoted above, the place had no light.

This court and the Court of Appeal in its numerous decisions has established some principles in respect of visual identification. Some of the cases were cited by the trial magistrate but she misapplied its principles. For instance, in the case of **Banzi John vs Republic, Criminal Appeal**

No. 644 of 2021 [2023] TZCA 207 [Tanzlii] the Court of Appeal warned the trial court the tendency of merely restating the principle as articulated in **Waziri Amani's** case without applying such principle to the evidence on record.

Also, in the case of **Kulwa Makwajape & Two Others v Republic, Criminal Appeal No. 35 of 2005** (CAT) (unreported) it was held that:

> *"... the intensity and illumination of the lamp is important so that a clear picture is given of the condition in which the appellants were identified."*

Moreover, in the case of **Lidumula s/o Luhusa @ Kasuga vs Republic, (Criminal Appeal No 352 of 2020) [2021]** TZCA 418 [Tanzlii] the Court of Appeal at page 18 cited with approval its decision in the case of **Juma Hamad vs Republic**, Criminal Appeal No. 141 of 2014 which held that:

> *"When it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable identifying witnesses to see and positively identify the accused persons. Bare assertions that "there was light" would not suffice."*

I fully subscribe to the above authorities as I join hands with Mr. Lukumay and Mr. Mgave that the appellant was not properly identified. This is because, there was no evidence from the victim on the intensity of the light which aided him to identify the culprits. The victim merely told the trial court that he saw the appellants clearly through the light which they had without even describing the type of light used. Bad enough, at the

place where they were taking alcohol together there was no light. Under such circumstances, as conceded by the parties to this appeal, I am also satisfied that the appellants were not identified well to warrant their conviction to the offence which attract severe punishment.

Concerning other noted weaknesses on part of prosecution, I also concur with the learned counsel for the appellant that the noted weaknesses show that the prosecution failed to prove the case against the appellant beyond reasonable doubts. Specifically, I would like to make it clear to the learned State Attorney that the contradiction in respect of the age of the victim in this case is not minor as it had an impact on the sentence meted against the appellant. Hence, the contradiction in respect of the age of the victim goes to the root of the case.

Having found as such, I hereby quash the conviction against the appellant and set aside the sentence meted against him. The appellant should be set free unless lawfully held.

Order accordingly.

Dated and delivered at Moshi this 15th day of September 2023.

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

X

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

15/09/2023