IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 19 OF 2023

(Originating from Criminal Case No. 70 of 2022 of Same District Court)

SAID SALIM @ KANYANI.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

21/08/2023 & 14/09/2023

SIMFUKWE, J.

This is an appeal by Said Salim @ Kanyani (the appellant) against the decision of the District Court of Same (the trial court) in Criminal Case No. 70 of 2022 in which he was charged and convicted of unnatural offence contrary to **section 154 (1) (a) and (2) of the Penal Code [Cap 16 R.E. 2022].** He was sentenced to serve life imprisonment. The offence was said to have been committed by the appellant on 15th June, 2022 at Mbakweni area within Same District in Kilimanjaro Region to a victim aged 5 years.

The brief facts of the case as stated by the prosecution before the trial court are that on the fateful date, PW1 (the victim) while on his way home

from school, he met the appellant who took him to his home. When they arrived at the appellant's home, the appellant undressed the victim and sodomised him. After he had finished, the appellant released the victim who was unable to walk properly. Upon reaching home, the mother of the victim (PW2) noticed that the victim was not walking properly. When asked, the victim narrated the tragedy to his mother and showed her what the appellant did to him. The victim's father (PW3) was also called inside and witnessed what the appellant did to the victim. The matter was reported to the local government leaders and later on to the police station and the victim was taken to the dispensary. At the dispensary, the victim was examined by the Clinical Officer (PW4) who testified that the victim's anus had bruises and waterly substances like semen which suggested that the victim was penetrated with a blunt object. The appellant was interrogated by PW5 and admitted in his cautioned statement (Exhibit PE2) to have committed the offence. PW6 the investigator of the case, produced a birth certificate (exhibit PE3) of the victim to substantiate the fact that the victim was a child of 6 years.

In his defence, the appellant denied to have committed the offence in question. He alleged that the case was fabricated against him because he owed the victim's father Tshs 350,000/- as labour charges of clearing his farm. The appellant explained that he was arraigned at the police and was beaten. That, in order to serve his life, he admitted to have committed unnatural offence.

The trial court found the prosecution case credible. It convicted and sentenced the appellant to serve life imprisonment. The appellant was aggrieved and filed this appeal on the following grounds:

1. *That, the learned trial magistrate grossly erred in both law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubt against the appellant and to the required standard by the law.*
2. *That, the learned trial magistrate grossly erred in both law and fact in failing to Note that PW1 grave (sic) incriminatory evidence against the appellant Despite his evidence being suspicious, Incredible and wholly unreliable.*
3. *That, the learned trial Magistrate grossly erred both in law and fact in relying upon the cautioned statement (EXh.PE2) allegedly given by the Appellant, despite the same being obtained illegally as the Appellant herein complained of being tortured and coerced in order to confess to the charged offence.*
4. *That, the learned trial Magistrate grossly erred both in law and fact in convicting the Appellant but failed to Note that, the evidence of PW2, PW3, PW4 and PW5 were not deserving to corroborate the Evidence of PW1 since these witnesses gave very highly improbable evidence which were supposed to be approached with a great caution as it demonstrates an Intention or desire to lie in order to achieve or attain a certain end. (sic)*
5. *That, the learned trial Magistrate grossly erred both in law and fact by being adamant that, the Appellant's defense -*

evidence did not raise reasonable doubt on the prosecution's case.

During the hearing of the appeal which was conducted through written submissions, the appellant was unrepresented and the respondent was represented by Mr. John Mgave, the learned State Attorney.

Supporting the first ground of appeal that the charge was not proved at the standard required by the law; the appellant faulted the trial magistrate for relying on the victim's evidence and failure to note that the same was taken contrary to **section 127(2) of the Evidence Act**, Cap 6 R.E 2022. He referred to page 9 and 10 last paragraph of the typed proceedings of the trial court where the victim was asked about his parents' names and whether he knew to tell the truth; then asked him what he was promising the court, whereby PW1 promised to tell the truth. The appellant argued that the posed questions had nothing to do with PW1 so as to meet all the conditions prescribed under **section 127(2) of the Evidence Act**. He referred to the case of **Edmund John @ Shayo vs Republic, Criminal Appeal No. 336 of 2019** at page 14 where the Court of Appeal held that:

"That, in the absence of any direction engrained in the provision of how the promise can be procured, the court must prior to getting the said promise, ask few and simple questions to the said witness to determine foremost, whether the child understands the nature of oath or affirmation."

On the strength of the above case, the appellant argued that the questions posed to PW1 by the trial magistrate do not at all show whether they intended to ascertain whether PW1 understands the nature of oath or affirmation. He was of the view that it cannot be said with certainty that the trial magistrate fully complied with s**ection 127(2) of the Evidence Act** (supra) before receiving the evidence of PW1. He urged this court to find that evidence of PW1 was received in contravention of the above cited section of law and expunge it from the record.

On the 3rd ground of appeal, the appellant faulted the trial court for relying upon the repudiated cautioned statement (Exhibit PE2) which was obtained illegally as he was tortured. Expounding this ground, the appellant averred that the trial magistrate never addressed the issue complained of that he was tortured and forced to admit the charged offence in the alleged cautioned statement. He submitted that in his strong and unchallenged defence evidence, he told the trial court that he was tortured to the extent that he decided to admit and obey the orders of those who were torturing him. He even tendered a PF3 to prove that he was tortured and that the exhibit was not obtained voluntarily. He implored the court to expunge the alleged cautioned statement from the record since it was illegally procured and procedurally relied upon.

Also, the appellant believed that the charge was not proved beyond reasonable doubt since the charge indicates that the alleged offence occurred on 15th June 2022. However, on the whole evidence of the victim nowhere he mentioned the date displayed on the charge sheet. Thus, the charge against the Appellant was a result of fabrication. He referred to the case of **Kandola Paulo @ Kadala vs Republic, Criminal Appeal**

No. 61 of 2017 at page 7 citing the case of **Justine Kakoni Kasusula** in which the Court of Appeal held that:

> *"Where the evidence on record does not tally with the charge sheet the court agrees with the appellant that, the prosecution has failed to prove their case beyond reasonable doubt because of the variance between what was stated in the charge sheet and the evidence adduced by the prosecution witness."*

Further reference was made to the case of **Ryoba Mariba @ Mungare vs Republic,** Criminal Appeal No. 74 of 2003 (unreported) which held that:

> *"…if there is variation in the dates, then the charge must be amended forth with and the accused explained his right to require the witnesses who have already testified recalled. If this is not done the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that a failure of justice will occur."*

The appellant prayed this court to amplify the findings of the above cases in resolving the shortfalls in the prosecution's case.

In his final remarks, the appellant prayed this court to find merit in his appeal, allow the same by quashing the conviction and set aside the sentence and set him at liberty.

In reply to the above submission, the learned State Attorney did not support the appeal. On the first ground on failure to comply to **section 127(2) of the Evidence Act** (supra), Mr. Mgave submitted to the contrary that the said provision was complied with. He said according to the said provision, a child of tender age may give evidence under oath or affirmation or without oath or affirmation, but before giving such evidence he/she must promise to tell the truth and not lies. That, the child promised to tell the truth after being asked few questions that helped the trial magistrate to understand whether the said child was able to speak the truth. That, the questions to be asked are not expressly provided under the provision of **section 127 (2) of the Evidence Act** as stated by the Court of Appeal in the case of **Godfrey Wilson vs Republic, Criminal Appeal No. 168 of 2018 [2019] TZCA 109**.

Mr. Mgave argued further that at page 10 of the typed proceedings the trial magistrate recorded the questions asked to PW1 and it is clear that the child promised to tell the truth and the trial court was satisfied and received his evidence. Concerning the questions to be asked, Mr. Mgave stated that the questions may be determined by the trial magistrate depending on the circumstances of the case.

Responding to the second ground of appeal that evidence of PW1 was suspicious, incredible and wholly unreliable, Mr. Mgave submitted that evidence of PW1 was properly taken and the trial court believed the same to be credible and truthful. That, the trial court was able to assess the demeanour of the witness while testifying and believed the said evidence after careful scrutiny and assured that it was the accused who sodomised the victim. The learned State Attorney referred to the case of **Marcelino**

Koivogui vs Republic, Criminal Appeal No. 469 of 2017 which cited the case of **Shabani Daud vs Republic, Criminal Appeal No. 28 of 2001** which at page 17 stated 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."*

Countering the third ground of appeal which concerns the admission of the cautioned statement, Mr. Mgave argued that the same was properly admitted. He referred the court at page 20 of the typed proceedings where the said cautioned statement was admitted without objection. He said the said exhibit was read to the accused person who did not object its content. Thus, his objection at this stage is an afterthought. The learned State Attorney notified this court that the appellant raised the defence that he was tortured when his cautioned statement was being recorded. However, when the said exhibit was tendered, he never raised such objection. He said it was at the defence stage when the appellant changed his mind which Mr. Mgave said was too late as he never utilised the opportunity he had during cross examination.

It was further submitted that the best evidence in criminal trial is that of accused person who confesses to have committed the crime. That, such confession should not readily infer or taken for granted. The prosecution has a duty of proving that the confession has been made properly and legally, voluntarily and recorded correctly as held in the case of **Athuman Rashid vs Republic, Criminal Appeal No. 138 of 1994**. That, the accused by his conduct or words, made a statement and that the statement or conduct amounting to a confession was made freely and

voluntarily. He maintained that the standard of proof which should be pointed out is that of beyond reasonable doubt in both instances.

It was further specified by Mr. Mgave that it is a principle of law that where an accused person objects to admission of a cautioned statement, a trial court must first make an inquiry or go through a trial within a trial to establish its voluntariness before accepting it as evidence. It was contended that the appellant never objected the cautioned statement hence the court could not have wasted its time to make inquiry on its own if no objection was raised. Reference was made to the case of **Nyakwama S/O Ondare @ Okware Vs Republic** (Criminal Appeal No. 507 of 2019 [2021] TZCA 592 [Tanzlii] at page 19 of the judgment which stated that a party who fails to cross examine on an important matter in the testimony of the adversary side is taken to have accepted what is stated by the said party. He added that even if the cautioned statement would have been obtained in contravention of the law, still the best evidence in sexual offences would stand to be that of the victim (PW1).

Replying to the fourth ground that evidence of PW2, PW3, PW4 and PW5 did not deserve to corroborate the evidence of PW1; it was argued that the trial magistrate received their evidence and had time to assess their demeanor before they could testify. Thus, their evidence was not improbable.

Responding to the allegation that PW1 did not mention the date when the offence was committed, the learned State Attorney submitted that such omission is not fatal and it is minor discrepancy and curable under **section 388 of the Criminal Procedure Act**, Cap 20 R.E 2022. That, the particulars of the offence, expressly state the date when the offence was

committed; that is on 15/06/2022 and that the same was read to the accused person who heard the date on which the offence is allegedly to have been committed. Again, evidence of PW1 is corroborated by PW2 and PW3 the parents of the victim (PW1) who noticed that he was sodomized, on 15/06/2022 when he was coming from school. Also, PW4 a doctor examined the victim on the same date that is on 15/06/2022. He formed an opinion that the date in this matter was not an issue for not being stated by the victim. Mr. Mgave told this court that the appellant didn't specifically state how he was prejudiced with the omission to state the date.

Lastly, responding to the fifth ground which concerns the allegation that the trial magistrate erred to find that the defence evidence did not raise any reasonable doubt; it was argued that the trial Magistrate considered the evidence of the appellant who alleged that the father of the victim planted this case to avoid paying his wage for clearing his farm. That, the trial court Magistrate in his judgment at page 13 reasoned that the defense of the appellant came as an afterthought because the accused person when given a chance to cross examine the witness one Mr. Said Shabani, the father of the victim did not ask or attempt to ask matters related to the said agreement. Therefore, raising such issue during his defense was an afterthought. Thus, his evidence was considered but the same did not shake anyhow the prosecution case.

Having considered the grounds of appeal, submissions by the parties, and the trial court's record, I now resort to determining the grounds of appeal seriatim having in mind that this being the first appellate court, where necessary, the court will re-evaluate and analyze the evidence on record

and come up with its own findings. The issue which cut across all the grounds of appeal is ***whether the prosecution case was proved beyond reasonable doubts as decided by the trial court.***

On the first ground of appeal, the appellant alleged that the prosecution case was not proved beyond reasonable doubt. The centre of his grievance was that evidence of the victim (PW1) was taken contrary to **section 127(2) of the Evidence Act**. He added that even the questions posed to the victim had nothing to do with him.

The learned State Attorney did not agree with the said allegations. He argued to the contrary that the provision of **section 127(2)** was complied with.

As rightly addressed to me by the appellant and the learned State Attorney, the provision which deals with the evidence of the child of tender age is **section 127(2) of the Evidence Act** which reads:

> *"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 has been interpreted by this court and the Court of Appeal in numerous decisions. For instance, the case of **Stephen Emmanuel vs Republic (Criminal Appeal 303 of 2019) [2022] TZCA 704** which cited with approval the case of **Geoffrey Wilson vs Republic,** (supra). In the cited case, it was stated that the trial magistrate should pose some simple questions to the child of tender age before concluding that he or she has promised to tell the truth. In the case of

John Mkorongo James vs Republic (Criminal Appeal 498 of 2020) [2022] TZCA 111 [Tanzlii] at page 12 to 13 of the judgment the Court had this to say:

> *"…The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court to tell the truth and not to tell lies. It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court to tell the truth and not tell lies.* ***It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the court to tell the truth and not tell lies before they testify. This is the reason why any child of tender age who is brought before the court as a witness is required to be examined first, albeit in brief, to know whether he/she understands the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the promise to the court to tell the truth and not tell lies*** *as per section 127 (2) of the Evidence Act."* Emphasis added

In the instant matter the trial magistrate before receiving the evidence of a child of tender age at page 10 of the proceedings recorded:

"Examination of the child the court

Question	*Answer*
What is the name of your father	*my father name is Saidi*
What is the name of your Mother	*My mother is Faidhat*
Do you know tell the truth	*Yes I know to tell the truth is Good God love it.*
What do you promise the court	*I promise the court to tell the Truth only on this court and not lies."*

From the above quoted proceeding, it is obvious that the trial magistrate fully complied to the above section on two reasons: ***First,*** the trial magistrate posed some questions before jumping to the conclusion that the victim promised to tell the truth. ***Second,*** the victim in his own words promised before the court to tell the truth and the same was recorded in direct speech.

The appellant also lamented that the posed questions had nothing to do with the victim. With due respect to the appellant, as rightly elaborated in the case above, the court is only enjoined to conduct examination first, albeit in brief, to know whether the child of tender age understands the meaning and nature of an oath/affirmation before it is concluded that he/she can give his/her evidence on the promise to the court to tell the truth and not tell lies. There is no law which requires certain types of

questions to be asked to the child of tender age. Therefore, the first ground of appeal has no merit.

On the second ground of appeal, the appellant was of the view that the victim's evidence was suspicious, incredible and wholly unreliable. The learned State Attorney contested that allegation. He stated that the victim's evidence was properly taken and the trial magistrate assessed it and believed the same.

The appellant did not explain to this court how the victim's evidence was suspicious and incredible. As rightly submitted by the learned State Attorney, the trial magistrate from page 9 of the judgment was satisfied that the victim knew the appellant even before. Also, at page 11 of the judgment, the trial magistrate analysed the evidence of the victim and was satisfied that the same proved the element of penetration. From page 10 to 12 the trial magistrate analysed the corroborative evidence of the cautioned statement and medical report. Therefore, I find no need of faulting his decision.

The next issue for determination is the grievance that the trial magistrate relied on the cautioned statement which was obtained illegally as the appellant was tortured and forced to confess to the charged offence.

The learned State Attorney disputed the argument by the appellant. He argued that the said cautioned statement was obtained voluntarily. He also noted that the appellant did not raise any objection so as to give the trial magistrate an avenue to conduct trial within a trial to establish the voluntariness of giving the said statement.

I agree with the learned advocate that according to the records, when the prosecution witness (PW5) tendered the cautioned statement, the appellant did not raise any concern/objection that he was tortured. At page 21 of the trial court proceedings when asked if he had any objection the appellant replied as follows:

> ***"ACCUSED: Said Salim Kanyani.***
>
> *I don't have any objection as to the cautioned statement it is my statement.*
>
> ***Signature of the accused."***

Despite the above noted reply, the appellant never cross examined on such aspect. Thus, challenging the same at the later stage is an afterthought as rightly decided by the learned trial magistrate at page 12 of the judgment. In the case of **Abas Kondo Gede vs Republic (Criminal Appeal No. 472 of 2017) [2020] TZCA 391** at page 20, the Court quoted with approval the decision of the Supreme Court of India in **Malanga Kumar Ganguly v. Sukumar Mukherjee, AIR 2010 SC 1162** which held that:

> *"It is trite that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. It is however trite that a document becomes inadmissible in evidence unless the author thereof is examined, the contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination in a Court of Law."*

On the fourth ground of appeal, the appellant lamented that the trial court failed to note that evidence of PW2, PW3, PW4 and PW5 were not deserving to corroborate the evidence of PW1 since these witnesses gave very highly improbable evidence. He stated that the charge sheet indicates that the offence occurred on 15.06.2022, however, the victim never mentioned the date in his testimony

On his side, the learned State Attorney submitted that the said evidence deserved to corroborate the victim's evidence. He argued that though the victim did not mention the date, the charge sheet displays the date and the witnesses to wit PW2 and PW3 said that the offence occurred on such date. Also, the victim was taken to hospital on the same date, that is on 15.06.2022.

This ground will not detain me, as rightly submitted by Mr. Mgave the learned State Attorney, the omission to mention the date when the offence occurred is not fatal considering the fact that other witnesses mentioned the exact date as it appears in the charge sheet. Thus, such omission is cured under **section 388 of the Criminal Procedure Act** which is to the effect that no finding, sentence or order made by a court of competent jurisdiction shall be reversed on appeal or revision on account of error, omission or irregularity unless such error has in fact occasioned a failure of justice. In this case, the appellant did not tell this court how he was prejudiced by such omission. I am of considered opinion that the cited cases of **Kandola Paulo @ Kadala** and **Ryoba Mariba @Mungare** are distinguishable to this case since the same concern the circumstances where there is variation between the charge and evidence while in the

present case, there is no variation of dates between the charge sheet and evidence.

Lastly, on the fifth ground of appeal, the appellant faulted the trial court for finding that the appellant's evidence did not raise any reasonable doubt. The learned State Attorney made reference to the impugned judgment at page 13 and supported the findings that the defence evidence did not raise any doubt.

I am aware that the duty of the defence side in any criminal case is to raise doubts. In the present case, the trial magistrate considered the defence evidence thoroughly as seen at page 13 to 14 and was satisfied that the same did not raise any doubt. Thus, I do not find any reason to fault that finding as the appellant did not indicate which evidence raised doubt and the type of doubt it raised on prosecution case.

Having discussed all the grounds of appeal raised by the appellant, as a first appellant court, I find no plausible reason to fault the decision of the trial court. I also find that the prosecution managed to prove the case against the appellant beyond reasonable doubts. Consequently, I dismiss this appeal in its entirety.

Dated and delivered at Moshi this 14th 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

14.09.2023