IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 45 OF 2023

(Originating from Criminal Case No. 316 of 2021 Kinondoni District Court)

BETWEEN

SAID ABDALLAH LWAMBO @ BABA ASHA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

08th & 13rd Nov, 2023

KIREKIANO, J.:

The appellant herein was tried at the District Court of Kinondoni with the offence of unnatural offence Contrary to Section 154 (1) (a) and (2) of the Penal Code Cap 16 [RE 2019]. According to the charge, the allegation was that on 26 January 2021 at Tandale Kinondoni the appellant did have Carnal knowledge of a boy aged 5 years against the order of nature. The boy's name is on record, I shall sufficiently name him "the victim".

The trial court found that the charge was proved beyond reasonable doubt, it convicted the appellant and a mandatory sentence of life imprisonment was equally inflicted.

Briefly stated the facts leading to the appellant's conviction and sentence are as follows;

The victim is the son of PW2 Amina Rajabu, he was aged 6 years. On 26/1/2021 while at home, PW2 sent the victim to buy maize flour so that she could prepare lunch. The victim delayed to come back. PW2 was suspicious when she decided to make a follow-up with the victim, he met him on the way crying and bleeding from his anus.

The matter was reported to the police at Mabatini police station and the victim was examined at Sinza Palestina Hospital by PW2 Dr. Gloria Lema. According to her findings, the victim had ruptured anus.

According to the victim he was sodomised by a man he identified as Baba Asha who forcefully grabbed him to a finished building. This was done during daytime. Upon police investigation, the appellant was arrested by PW4 H 9483 DC Oman on 11/2/2021.

The appellant denied committing the offence. His version was that on 20/02/2021 he met a woman and a child in the company of police he was arrested and informed that he would know the charge at the police station. He was released and was later arrested on 15/10/2021 and charged on 22/10/2021. He said he did not know the offence he associated this offence with the fact that he had assisted police in arresting PW2's husband.

The trial court found that the charge was proved to the required standard, it relied on the evidence by the victim and that there was corroborating evidence by PW2, the victim's mother.

Dissatisfied with this decision the appellant preferred this appeal setting forth seven grounds of appeal:-

1. *That, the learned trial court erred in law in holding the appellant's conviction founded on the evidence of PW2 which was taken in contravention of section 127 (2) of the Evidence Act, as amended by Act No. 4 of 2016.*
2. *That, the learned trial court grossly erred in law and fact in holding on the PF3 (Exhibit P1) while the procedure adopted in admitting the same was improper on account of being read before it was admitted in evidence, at that time the record is silent whether it was admitted.*

3. *That, the learned trial court erred in law and fact by holding the appellant's conviction without considering that the rest of the evidence of PW1, PW3, PW4 and PW5 is not worthy for corroborative purposes against PW2's story.*
4. *That, the learned trial court grossly erred in law by failing to append her signature on the evidence of PW1, PW2, PW3, PW4 and PW5 contrary to section 210 (1) (a) of the Criminal Procedure Act Cap. 20 R.E 2019 hence rendering the trial court proceedings a nullity.*
5. *That, the trial magistrate grossly misdirected herself and consequently erred in law and fact in holding that the appellant was positively identified at the alleged scene of crime based on the weak, tenuous, incredible and wholly unreliable evidence of PW2.*
6. *That, the learned trial court erred in law and fact by convicting the appellant without considering that the defence was very cogent that raised reasonable doubt to the prosecution case.*
7. *That, the learned trial magistrate erred by failure to observe that the case for the prosecution was not proved to the hilt.*

The appellant was unrepresented and the respondent had the service of Miss Dorothy Massawe, Principal State Attorney.

In the 1st, 2nd and 3rd grounds, the appellant jointly submitted that the evidence of the victim was improperly recorded without complying with section 127 (2) of the Evidence Act. He argued that the trial magistrate ought

to have conducted a test to satisfy the competence of the witness before receiving his promise. As such the promise out to be complete that is the witness should have promised to tell the truth and not to tell lies.

He cited the decision in **Yusuph Molo vs. Republic**, Criminal Appeal No. 343 of 2017 that;

> *"Such promise must be reflected on record of the trial if such promise is not reflected that it is blow to prosecution case".*

He also cited **Mohamed Ramadhani @Kolahili vs. Republic, Criminal Appeal No. 396 of 2021**. He prayed that the evidence of PW1 the victim be expunged from the record.

It was also submitted that the evidence in Exhibit P1, PF3 was improperly admitted as the same was read before it was admitted he cited **Robinson Mwanjisi & Others vs. Republic**, [2003] TLR 2018 to the effect that the same should equally be expunged.

On the fourth ground, he argued that the trial magistrate did not append her signature to every testimony of witnesses contrary to the requirement in section 210 Criminal Procedure Act Cap 20 but also a decision

in **Samwel Nicodemus Bwandu vs. Republic**, Criminal Appeal No. 217/2017. It was the appellant stance that the proceedings were thus a nullity.

On the 5th ground, he submitted that there was no tangible evidence of identification of the appellant. He asked this court to consider the victim did not unmistakably identify the appellant. He cited the case in **Mengi Paulo Samweku Luhanga and Another vs. Republic**, Criminal Appeal No. 222 of 2006 with the view that eye witness can also be devastating when honest confusion is made.

The appellant argued that if the victim knew the appellant when and to whom did he mention his name. He said, according to PW5, the witness victim recorded his statement on 11/02/2021 when he named the said *Baba Asha* while he could have done so after he was treated and discharged on 26/1/2021. He relied on the decision in **Marwa Wangai and Another vs. Republic,** that the ability of the witness to name a suspect the earliest was assurance of his reliability.

On the sixth ground, he argued that the trial court did not take into account his defence of alibi that he was at Bagamoyo. As such the

persecution did not even examine him on the evidence that he had assisted in the arrest of PW2's husband.

The appellant also argued that there was variation in the order of conviction as the same did not match the charge, that is the appellant was charged under Section 154 (1) (a) and (2) of the Penal Code while he was convicted under Section 154 (1) (c) and (2) of Penal Code

The respondent republic through Miss Dorothy Massawe responded that;

The victim gave testimony under promise and that this promise was well extracted. She said the test of voire dire stated in the cited case of **George Choto** was not necessary. She cited the decision in **Mathayo Laurence William vs. Republic, Criminal Appeal No. 53 of 2020** to support her view.

On the 2nd ground, she admitted that the record is silent on the admission of PF3 (Exhibit P- 1). Even if the same is expunged from the record the best evidence remains that of the victim PW1. She cited the decision of **Selemani Makumba vs Republic Criminal Appeal No. 94 of 1999.**

On the 3rd, 6th and 7th ground, it was argued that the victim was capable of explaining the act done by the appellant and there was corroborating evidence from PW2, PW3 and PW4.

On the fourth ground on the complaint that the trial magistrate did not append her signature after the witness's testimony the same is not supported by the record.

On the question of identification in ground no. 5, it was submitted that the condition was favourable for the victim to identify his assailant given the conditions stated in the case of **Waziri Amani.**

On the complaint that the trial court finding on conviction did not match the charge, that is the appellant was charged under Section 154 (1) (a) and (2) of the Penal Code while he was sentenced under Section 154 (1) (c) and (2) of Penal Code, Miss Massawe submitted that this did not occasion failure of justice thus it is curable under section 388 of Criminal Procedure Act.

In his rejoinder, the appellant argued that the failure of the trial court to conduct the test was an infraction of the clear provision of section 127 (2) TEA. He argued the decision in **Mathayo Lawrence** is distinguishable

because the trial magistrate wrongly jumped to the conclusion that PW1 the victim promised to tell the truth without first testing his competence.

As such referring to the decision in **Mohamed Ramadhani @ Kolahili,** the named evidence of the doctor could be useful if the evidence of the victim was not properly admitted.

On identification, he wondered if the victim identified or knew his abuser and why didn't he mention the names to his mother PW2 until when he was interviewed by investigator PW5. Given the decision in **Marwa Wangai and Another vs. Republic**, the evidence of the victim was weak as he failed to name a person who abused him at the earliest stage. In proving the charge, the prosecution was tasked to prove that the victim was on 26/01/2021 sodomised and that it was the appellant who did it.

It is also the position that in charge of sexual abuse like the one at hand the best evidence is the victim himself. This is as rightly submitted by Miss Massawe who cited the decision in **Selemani Makumba vs. Republic,** supra.

In addressing the grounds of appeal, I wish to start with the complaint of variation of the section cited in the judgment and the charge sheet.

admittedly the learned trial magistrate cited section 154 (1) c instead of section 154 (1) a, appearing in the charge sheet. the appellant thinks this vitiates the judgment. In the case of **Safari Anthony @ Mtelemko & Another vs Republic (Criminal Appeal No. 404 of 2021)** the court of appeal said;

> *'For a trial in a criminal case to be a nullity it must be shown that the irregularity was such that it prejudiced the accused and therefore occasioned failure of justice. This is the present position, and for the time being, an ongoing position of the law, which we think fits a progressive and positively changing society like ours. It reflects what we refer to as the justice-driven approach; the approach permitting the court to pause, and interrogate the parties and itself to find out whether justice was done, irrespective of the procedural infraction'. (Emphasis supplied)*

The two sub-sections describe the scenario the offence phone may be committed. The appellant knew he was charged under section 154 (1) a. It is based on this I agree with Miss Masawe that the anomaly may be cured under section 388 of the Criminal Procedure Code.

Now on the validity of the testimony of the victim, it is clear from the record the victim was aged six years hence he was a child of tender age. His testimony therefore ought to be recorded in terms of Section 127 (2) of the Tanzania Evidence Act. The record from the proceedings is the same as shown on page 8: -

Court: Prosecution Case Opens

> ***"PW1 (Victim) 6 years Nursery School Pupil*** *resident of Kibamba Muslim resides with his mother.*
>
> *The child knows the bad side of telling lies and that he will suffer and says that telling the truth is good. The child promised to tell the truth".*

From this except the appellant stance that he did not comply with Section 127 (2) TEA. In the cited case of **Yusuph Molo,** the court emphasized that the: -

> *"What is paramount is for the child before giving evidence to give a promise, to tell the truth to the court not lies such promise must be reflected on record".*

As such in the other case cited by the appellant **Mohamed Ramadhani @Kolahili vs. Republic**, it was held on page 8 that:

"The child's promise must be actual and recorded in the proceedings".

I have also reflected with concern about the way the trial magistrate concluded that the witness (victim) had promised to tell the truth. For the promise to be actual was the same ought to be in the witness's own words In **John Mkorongo vs. Republic**, Criminal Appeal No. 498/2020 the court of appeal on page 13 held;

"It is recommended that the promise to the court under Section 127 (2) of the Evidence Act should be direct speech and complete".

I am also aware of the decision in **Mathayo Laurence Mollel** cited by Miss Massawe what was at issue in that case was whether the trial court needed to conduct a test before receiving evidence under promise, the court did not say the promise should not be direct.

Because of the above, I agree with the appellant on the first ground that the evidence of the victim was improperly received and given the cited cases of **Mohamed Ramadhani** and **John Mkorongo** the same is expunged from the record.

Concerning the complaint on the admission of the PF3 (Exhibit P –1) it is common ground that the record is silent on whether this report was admitted. Without many words, this court will proceed in disregard of the same the same.

However, it is to be noted here that the oral testimony of the doctor who examined the victim shall not fail the validity test since there is no corresponding document, see **Shilanga Bunzali vs. Republic, Criminal Appeal No. 600 of 2020.** https://tanzlii.org on page 13 that;

> *We are aware that, it is a settled position of the law that, the credible oral account shall not fail the validity test merely because there is no corresponding documentary account.*

The evidence of the doctor PW3 Gloria Lema was loud that when she examined the victim, she found him with a ruptured anus. The question remains what happened to the victim? This is where it was held in the case of **Selemani Makumba vs Republic Criminal Appeal No. 94 of 1999 (unreported)** it was stated: -

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and consent*

and in case of any other women where consent is irrelevant, that there was penetration.

Although the above case referred to the rape cases, it is in the same spirit in cases of unnatural offence concerning proof of penetration the same reasoning will apply. Having discarded the evidence of the victim, the evidence of the doctor has nothing to corroborate.

All said this appeal succeeds on the first ground, the appellant's conviction and sentence meted by the district court is set aside. The appellant should be released from prison forthwith unless otherwise lawfully held.

A. J. KIREKIANO

JUDGE

13/11/2023

COURT: Judgment delivered in chamber in presence of the appellant and Miss Doroth Massawe – PSA for Respondent.

Sgd: A. J. KIREKIANO

JUDGE

13/11/2023