IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

MISC. CRIMINAL APPEAL NO. 98 OF 2023

(Appeal from Criminal Case No. 25 of 2023 in the District Court of Misungwi at Misungwi before Hon. A. P. Shao, PRM dated on 15th June, 2023)

HERMAN MUSSA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

31st October, & 15 November, 2023.

MUSOKWA, J.

In the District Court of Misungwi, the appellant herein was arraigned and indicted for trial with the offence of unnatural offence, contrary to section 154 (1) (a) of the Penal Code, Cap. 16 R.E. 2022 (the Code). The trial ended with a conviction followed by a custodial sentence of thirty years. The appellant was further ordered to compensate the victim the sum of Tshs. 1,000,000. Aggrieved by the decision of the trial court, the appellant has instituted the instant appeal before this court with six (6) grounds of appeal as reproduced hereinafter: -

1. *That the appellant was convicted and sentenced on a defective charge.*

2. *That the case against the appellant proved with non-compliance of section 62 (1) of the Tanzania Law of Evidence (TEA), Cap 6. R.E 2022.*
3. *That the prosecution was not proved beyond a reasonable doubt which wasn't clearly connected with facts from which the interference was informed.*
4. *That the prosecution evidence lacked corroborative evidence which required pointing the irresistibility to the appellant's guilty.*
5. *That the trial magistrate erred in law and fact to convict the appellant by relying on sign of blunt object in PF3 which does not prove the offence of unnatural offence as required to the law of the land.*
6. *That the trial magistrate erred in law and fact to convict and sentence the appellant basing on weak and suspicious, conjectures and assumptions evidence which have no room in criminal trials.*

The facts surrounding the instant appeal can be traced back to the year 2021. The exact date is unknown. It was alleged that there were two young men who were unnaturally offending students at Misasi Secondary School, the accused being among the two. The information reached the police who in turn informed the headmaster. The headmaster arranged for a medical examination of one of the boys who, it was alleged, was among the victims. The examination of the victim at Misasi Health Centre revealed that the

victim had been unnaturally offended. The accused was arrested and arraigned where he pleaded not guilty to the charge. The outcome of the trial was the conviction and sentencing of the accused, to which he is now appealing against.

In the hearing of this appeal, the appellant was unrepresented. The respondent was represented by learned state attorneys Mr. Christoper Olembile and Ms. Monica Mwery. The learned state attorney Ms. Mwery proceeded with her submissions, upon the appellant having nothing to add or clarify further on his petition of appeal.

The learned counsel for the respondent at the onset was forthcoming and declared that they do not object the appeal. Ms. Mwery submitted that the respondent subscribes to the fact that the appeal should be allowed based on several grounds. Among the grounds, she explained, is based on failure by the prosecution to take the necessary steps to ascertain the age of the accused. Explaining this further, the learned attorney invited the court to refer to page 5 of the typed proceedings of the trial court, where the accused, in response to the facts of the case, disputed the fact that he was aged 21 years. He claimed to be of the age of 19. Ms. Mwery, continuing with her submission, reiterated that the issue of age was brought up again

by the accused when stating his personal particulars before proceeding with his defence on page 16; where he again stated that he was 19 years old. During cross examination, the accused explains further that he was born in 2004 and completed form four in 2022 at the age of 17.

Ms. Mwery observed that the prosecution, during the trial proceedings, neglected to perform due diligence in ascertaining the age of the accused, herein the appellant. According to the charge, she stated, the offence was committed in 2021. In this regard, she concluded, the appellant was telling the truth when he claimed that he was 17 years old when the alleged offence was committed. Ms. Mwery admitted that it is the duty of the prosecution to prove a criminal case beyond reasonable doubt. Several authorities were preferred in support of her submission. These included **Edward Nyegela Vs. The Republic***,* Criminal Appeal No. 312 of 2019 (unreported); and **Sosthenes Myazagiro @ Nyarushashi Vs. The Republic,** Criminal Appeal No. 276 of 2014 (unreported). The learned counsel also referred to ***Section 3(2) (a) of the Evidence Act*****, Cap. 6, R.E. 2019.**

Ms. Mwery asserted that failure by the prosecution to determine the age of the appellant at the commencement of the proceedings, when the

appellant objected to the facts with respect to his age, resulted in a fatal error. This led to the case being instituted at the District Court of Misungwi which had no jurisdiction to adjudicate on the matter. Instead, the case ought to have been instituted at the Juvenile Court. The respondent's counsel submitted that as a result of such grave an error, the proceedings are null and void. The learned state attorney stated that the proper remedy under the prevailing circumstances, is not a re-trial. This, she explained further, is due to the fact that certain conditions must be met before the Court can order a re-trial. Among the conditions that pre-determine the justification of a re-trial order, is that the available evidence must suffice to convict the accused.

Ms. Mwery, in considering this condition and applying it to the present case, submitted that the evidence before the trial court was insufficient to prove the guilt of the appellant. The learned state attorney noted the existence of discrepancies in the evidence that was relied upon by the prosecution in proving their case during the trial. The testimony of the victim, (PW1) is referred on page 8 of the typed trial proceedings, whereby PW1 (victim) explains that the appellant committed the offence in the presence of other students. However, PW2 who is the mother of victim

narrates the information she received from the police; to the effect that the victim was sexually assaulted by two young men as reflected on page 9 of the typed trial proceedings.

The learned counsel for the respondent continued to make an assessment of the evidence that was relied upon by the prosecution. Observing that there was undue delay in reporting the crime to the police authorities, she noted that while the alleged offence was committed in 2021, more than 2 years had lapsed before the matter was reported to the police. Ms. Mwery submitted that the Court of Appeal has provided guidance on this matter through several decisions. The Court of Appeal has directed that where there has been delay in reporting a crime, then reasons should be provided. In the present case, reasons were not provided to explain the delay. She further noted that the victim, at the approximate age of 17, possessed the maturity necessary to determine the proper measures to be taken which include reporting the matter. Cementing this point, the respondent's counsel cited the case of **Francis Ale Vs. The Republic,** Criminal Appeal No. 185 of 2017.

In concluding her submission, Ms. Mwery prayed that the appeal be allowed. She further prayed for the court to consider an appropriate remedy under the circumstances.

The appellant, seemingly pre-emptied, found it prudent to dispense with his submissions. His mere prayer was that the court should allow his appeal, quash the conviction and order the end of his custodial sentence.

Upon hearing the submissions from the parties, Ms. Mwery learned attorney has raised an important point of law relating to the jurisdiction of the trial court. Notably, it is a settled principle of law that a point of law can be raised at any stage even at the appeal stage. As rightly submitted by the learned state attorney, the typed trial court proceedings on page 16 show that when cross examined, the appellant testified that he was born in 2004. Until the conclusion of the trial there was no evidence given to prove otherwise. In that regard, by 2021 when the offence was allegedly committed, the appellant was aged 17 years. In view of this, the appellant for all intents and purposes, was a child under the provisions of the ***Law of the Child Act, Cap. 13, R.E. 2019*** (LCA). Section 4(1) of LCA states that *"A person below the age of eighteen years shall be known as a child".* In addition, the LCA, section 97(1) provides further that: -

"(1) There shall be established a court to be known as the ***Juvenile Court for purposes of hearing and determining child matters.***

(2) The Chief Justice may, by notice in the Gazette, designate any premises used by a primary court to be a Juvenile Court.

(3) A Resident Magistrate shall be assigned to preside over the Juvenile Court. [Emphasis added]

In the case of **Furaha Johnson Vs. Republic** Criminal Appeal No. 452 of 2015, the Court of Appeal of Tanzania (Court of Appeal) sitting in Arusha held as follows: -

"The Court takes judicial notice of the fact that the District Court of Moshi which tried the appellant is not a Juvenile Court. Since the appellant at the time of his arraignment and trial was a child, he was not triable by the district court, but a Juvenile Court. The trial court, therefore, lacked ***jurisdiction ratione personae*** *to try the appellant. This alone rendered his trial a nullity. But even if the appellant had been tried by the appropriate court, the conduct of the trial in the absence of a social welfare officer* ***would have equally rendered the trial a nullity"****. [Emphasis added]*

Similarly, in the case of **Amos Robare@James Vs. Republic,** Criminal Appeal No.401 of 2017 the Court of Appeal sitting in Mwanza held as follows:

"In the case at hand, it is indicated nowhere that the District Court of Serengeti ***was sitting as a Juvenile Court*** *when presiding over the charge against the appellant.* ***Neither has it been indicated anywhere in the record of appeal that the Social Welfare Officer was present during the proceedings****.* ***The proceedings before it were therefore a nullity****". [Emphasis added]*

In consequence whereof, I find merit in this appeal but only on the basis of the legal point raised by Ms. Mwery. I accordingly, nullify the appellant's trial, conviction and sentence, and proceed to quash and set them aside. I further order immediate release of the appellant from prison unless he is otherwise lawfully held.

It is so ordered.

Right of appeal explained.

DATED at **MWANZA** this 15th day of November, 2023.

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

I. D. MUSOKWA

JUDGE

Court:

This Judgment is delivered in Court today the 15th day of November, 2023 in the presence of Mr. John Joss, learned state attorney representing the respondent and, Mr. Herman Mussa, the Appellant who appeared in person.

I. D. Musokwa
JUDGE
15.11.2023