IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 176 OF 2023

(Originating from Criminal Case No. 140 of 2023 of Mkuranga District Court)

GEDION HERMAN @BILASIO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 01/11/2023

Date of Judgment: 28/11/2023

DING'OHI, J.

The appellant, **GIDEON HERMAN@ BILASIO,** was arraigned and charged in the District Court of Mkuranga at Mkuranga for the offence of unnatural offence contrary to section 154 (1) (a) of the Penal

Code [Cap. 16 R. E. 2022] (hereinafter to be referred to as the Penal Code).

In the trial court, the prosecution side lined up five witnesses who testified against the appellant. It was alleged, at the trial, that on diverse dates between September and December 2022, the appellant had carnal knowledge against the order of nature with one, LUA (not the real name to hide the victim's identity).

The historical background of this case is not hard to tell. The Appellant happened to be the stepfather of the victim in that the mother of the victim was living under the same roof with the Appellant as wife and husband, respectively. The record shows that, where the mother of the victim traveled the stepfather(the appellant) was made to remain home with the victim to take care of him. It is under those circumstances, that it is alleged, the appellant had a chance of sodomizing the victim. It is further alleged that, after the acts, the appellant kept threatening the victim not to tell anyone about the incident otherwise he would kill him. It would appear the victim obeyed the threats in that he remained in pain without disclosing the acts to anybody.

One day when the victim was in class studying, his anus lost control. He defecated therein. When asked as to what was wrong with him he explained to his teacher that he had been sodomized by the present Appellant.

The incident was reported to the police station. On examination at the hospital, it was found that the victim's anus was penetrated by a blunt object causing the same to be loose.

In his sworn defence, the appellant vehemently refuted the allegations of committing an unnatural offense against the victim. He defended that the case was a result of fabrication. According to him, the cause of the fabrication was a marital dispute between him and his wife, who is the mother of the victim. That the reconciliation at the family level and before the chairperson of their place proved futile. That, though the chairperson of their place had information about their family disputes, he did not disclose that when testified in court.

At the end of the trial, the trial court found that the prosecution side had proved the charge against the appellant beyond reasonable doubt. It proceeded to convict the appellant and sentenced him to life imprisonment.

Aggrieved, by the decision of the trial Court the appellant came before this court armed with four grounds of appeal to wit;

1. *That, the trial magistrate grossly misconceived the requirement and application of section 127 (2) of the Evidence Act, (Cap. 6 R.E. 2022) (hereinafter referred to as the Evidence Act) and hence convicted the appellant based on evidence of PW1 which was illegally obtained.*
2. *That, the learned trial magistrate grossly erred both in law and facts to convict the appellant relying on the evidence of PW 1 who was not a credible and fruitful witness.*
3. *That, the learned trial magistrate grossly erred both in law and facts for failure to properly evaluate, analyze, and consider the evidence of both prosecution and defense on record, the failure of which led the trial Court to an improper and erroneous decision.*
4. *That, the learned trial magistrate grossly erred in law to convict the appellant in a prosecution case that was not proved beyond reasonable doubt.*

In this appeal, the appellant appeared in person, unrepresented. The respondent Republic was represented by Ms. Neema Kwayu, learned State Attorney. The appeal was ordered to be disposed of by way of written submissions.

In the first ground of appeal, the appellant submitted that the evidence of the PW1 which was the basis of his conviction did not comply with the requirements of section 127 (2) of the Evidence Act. According to the Appellant, before taking the evidence of the PW1, who was the witness of the tender age, no examination was conducted by

the trial Court to test whether the PW1 knew the meaning and nature of an oath. Instead, according to the Appellant, the trial Court jumped to the conclusion that his evidence was taken on the promise that the witness would tell the truth.

Further, the appellant submitted that PW1's promise, to tell the truth, was not complete as required by the provisions of section 127 (2) of the Evidence Act as there was no statement of the promise to the effect that he would also not tell lies. He cited the case of **Godfrey Wilson vs Republic,** Criminal Appeal No. 168 of 2018 which has established guidelines to be followed before the reception of evidence of a child of tender age.

Submitting on the second ground of appeal the appellant contended that had the trial Court assessed the credibility of PW1, it would have found that his evidence would not have passed the test of truthfulness as required under section 126 (6) of the Evidence Act. It is the appellant's submission that the evidence of the Pw1 available in the trial court's record is highly improbable or implausible and materially contradicted by the evidence of other witnesses. Explaining the alleged contradictions, the appellant contended that while the PW1 testified to have been last sodomized in December 2022 the PW3 stated in evidence

that the incident was committed on 17/03/2023 when PW 1 allegedly defected in class. If that was the case, according to the appellant, why didn't he defect in class in December 2022 but in March 2023 after PW 3 revealed information on the incidence?

Furthermore, it was the appellant's submission that, if it was true that the PW1 was sodomized by him on 17/3/2023 why he was not taken to the hospital until 20/3/2023? According to the appellant, had the trial Court assessed the above highlighted anomalies it would not have convicted him as such.

Submitting on the third ground of appeal the appellant contended that the trial Court failed to evaluate, consider, and analyse properly the evidence of both sides. The appellant asserts that the Court of Appeal has consistently emphasized that the Court must have proper consideration of the evidence for the defense and balance it against that of the prosecution to determine which case is more cogent. The appellant referred the court to the cases of **Elia Steven vs R,** [1982] TLR 313, **Leonard Mwanashoka vs R,** Criminal Appeal No. 267 of 2006 (unreported), and **Vernance Nkuba and Another vs R,** Criminal Appeal No. 425 of 2013 (unreported) to support his argument.

It was the appellant's case that, after summarizing the defense evidence, the records do not show if the evidence was analyzed, evaluated, or weighed against the evidence of the prosecution side. He contended that the DW2 in the evidence told the trial court about the source of the family disputes which led to the separation between him and the mother of the victim but such evidence was not considered. It is the appellant's case that failure to evaluate or analyze defense evidence inevitably leads to wrong and or biased conclusions resulting in a miscarriage of justice.

On the last ground of appeal, the appellant asserted that he was convicted on the charge which was not proved beyond reasonable doubt. He submitted that it is a cardinal principle that the duty to prove a charge lies with the prosecution per the provisions of sections 110,112 and 3 (2)(a) of the Evidence Act. He cited the case of **Jonas Nkize v.R** [1992] TLR No 213 and **Joseph John Makune v. R** [1986] TLR No 44 to back up his submissions. It is his further submissions that the evidence relied upon to base the conviction of the appellant was that of the PW1 which was taken against requirements of section 127 (2) of the Evidence Act.

Given the foregoing, the appellant prays that his appeal be allowed; the conviction and sentence be quashed and he be released from prison.

Replying to submissions on the first ground of appeal, the respondent had the view that the trial Court did not illegally take the evidence of PW1. He said the law under section 127(2) of the Evidence Act requires a child of tender age to testify under oath or promise to tell the truth. On page 4 of the typed proceedings, PW1 informed the Court that it is good to tell the truth and he accordingly did as he promised. Thus, from the testimony of PW1, the respondent believes that what was testified by him was nothing but the truth. Therefore, according to the learned state attorney, it cannot be said that the evidence of PW1 was obtained illegally. He cited the case of **Samwel Abraham @ Chuma vs Republic,** Criminal Appeal No. 531 of 2020 which set the rule on the promise to tell the truth, to support his submissions.

With regards to the second ground of appeal, the respondent submitted that the evidence of PW1 was very truthful and credible. That is because, according to him, before giving the testimony the witness told the Court that he would tell the truth and that the witness executed his promise as per the law. Moreover, the learned state attorney went

on, when PW1 was testifying the Court took note of his demeanor and was satisfied that PW1 was telling nothing but the truth. He cited the case of **Wambura Kiginga vs Republic,** Criminal Appeal No. 301 of 2018 which maintained the principle that every witness is entitled to credence and must be believed and his testimony accepted unless there are good reasons not to believe him.

Submitting against the third ground of appeal, the learned state attorney had the view that, the trial Court properly evaluated, analyzed, and considered both the prosecution and defense evidence and reached the right decision. According to the learned state attorney, on pages 1 to 4 of the judgment of the trial Court summarized the evidence of both sides before it analyzed the same on pages 4 to 8 of the typed judgment. It is the learned state attorney's view that this ground of appeal is also without merits.

On the last ground of appeal, the learned state attorney strongly resisted the appellant's view that the charge was not proved to the required standard. According to him, the charge was proved beyond any reasonable doubt. He said, that in this kind of offense, the best evidence is from the victim per the case of **Selmani Makumba vs Republic (supra).**

According to the learned State Attorney, to prove the age of the victim, on page 5 of the typed proceedings PW1(the victim himself) told the trial court that he was 9 years old at the time he testified in the trial court and PW2, the mother of the victim, also told the court the same thing as regard to victim's age. As to the evidence of penetration, the learned state attorney submitted that, on page 5, PW1 narrated how he was sodomized by the appellant in that the appellant inserted his penis into the victim's anus to the extent of causing stool to come out.He said,that is more than enough to prove penetration.

The learned State Attorney went on to submit that, the PW4, the doctor, who examined the victim found out that the victim's anus was so loose due to penetration by a blunt object. It was further submitted on behalf of the Respondent Republic that, the issue as to whether it was the appellant that committed the offense is well resolved in favor of the Respondent. That is because, according to the learned state Attorney, it is not disputed that the Appellant was living with the victim and when PW2 traveled, he was the one left with the victim., the victim mentioned the Appellant as a sadomist in this case.

Having gone through the records of the trial Court and the submissions for and against the appeal before this Court it is at this juncture the Court engrosses in the determination of this appeal.

Beginning with the first ground of appeal, the appellant's main complaint is that the evidence of the PW1, a witness of tender age, was illegally procured in contravention of the provisions of section 127(2) of the Evidence Act. It is the appellant's concern that the witness was required to promise before the Court that he would tell the truth and not lie. But, according to the appellant, in this case, the PW1 only promised to tell the truth but he did not qualify his statement that he would not tell lies. I have respectively considered that complaint. Section 127 (2) of the Evidence Act provides that;

> *"127 (2) 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."*

After dutiful perusal of the trial court's record, I will agree with the Appellant that the PW1 on examination by the trial magistrate only promised to tell the truth in evidence. The records do not show that the PW1 also promised not to tell lies. I have considered as to what is the effect, if any, under the circumstances.

In the case of **Mathayo Laurance William Mollel vs the Republic,** Criminal Appeal No. 53 of 2020 CAT (Unreported) the court had the following 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" Simply 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.*

Back to my case and having the above stance of the court of appeal in mind, I find that the promise given by the victim of this case, to tell the truth was complete and well per the law. Having resolved that way, I find that the complaint by the appellant made under the first ground of appeal is without any substance; It is hereby dismissed.

As regards the second ground of appeal, the appellant contended that the trial court relied on the evidence of PW1 which was not credible and truthful. He pointed out pieces of evidence that he finds corrodes the credibility of PW1 and is in contradiction with other evidence of his witnesses. The respondent on the other side argued that the evidence of

PW1 was truthful and credible. He contended that since the PW1 promised to tell the truth his evidence is believed to be the truth.

I have taken time to go through the records on the disputed piece of evidence. I will have a few words to say on that complaint. It is my settled view that in arriving at justice, evidence of the case should not be picked by pieces of phrases but rather by reading the evidence as a whole to get the proper meaning carried in the evidence. What I have understood from the evidence of the prosecution side which was properly believed by the trial court is that the incident against the victim was not done once. It was done on some days.

On careful visit of the record of this appeal, it seems that the appellant may have misconceived interpretation of the prosecution evidence. What the PW3 told the court is that on 17/3/2023 he saw PW 1 defecated in class and not that it is when the incident was revealed as claimed by the appellant.

I therefore find that there was no contradiction worth termed so in the prosecution evidence at the trial court. Under the circumstances, I find no good reason under the circumstances of this case not to believe the prosecution witnesses on that. In the case of **Goodluck Kyando vs Republic** [2006] TLR 36 it was 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".

In the circumstance of this case, having gone through the proceedings of the trial Court, I find no good and cogent reason not to believe PW1 per the complaint raised by the appellant. I find this second ground too meritless.

On the third ground of appeal, the appellant contended that the trial Court erred in not properly evaluating, analyzing, and considering the evidence of both sides hence reaching an improper and erroneous decision.

It was submitted by the appellant that apart from summarizing the defence evidence, the judgment is silent as to whether the evidence was analyzed and weighed. The appellant referred to the evidence of PW2 who said there were misunderstandings between her and the appellant and that even DW2 knew of the misunderstanding which caused PW2 and PW1 to leave the appellant's house four months before the occurrence of the incident.

I have considered that piece of submission and found that there is no way the disputes between the appellant and the victim's mother, if at

all, would influence the PW1 a witness of tender age to fabricate evidence against the appellant.

The evidence is very clear that it was the victim's teacher who was the first person to see the victim defecated and later, on examination, it was found that he was sodomized. The witness was declared to be reliable by the trial court, I find no material to differ from that finding.

It is for the reasons above, I am reluctant to share the appellant's view that the charge against him was not proved before the trial court. It was proved to the required standard

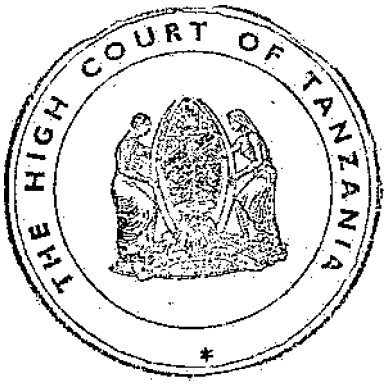
In the event, I find that this appeal has no merit. It is hereby dismissed.

S. R. DING'OHI

JUDGE

28/11/2023

Court: Judgment delivered at Mtwara through video conference this 28th day of November, 2023 in the presence of Ms. Amina Macha,learned State Attorney for the respondent and the appellant who has appeared in person and unrepresented.



S. R. DING'OHI

JUDGE

28/11/2023