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

**CRIMINAL APPEAL NO. 36 OF 2023**

*(Appeal from the decision of the District Court of Moshi at Moshi dated 27th February 2023 in Criminal Case No. 215 of 2022)*

**LUCA SEMBOJA MLAUWASA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

# JUDGMENT

17th October & 5th December, 2023

**A.P.KILIMI, J.:**

The appellant Luca Semboja Mlauwasa and another person not part of this appeal were arraigned at the District Court of Moshi at Moshi with one count of unnatural offence contrary to section 154 (1) (a) of the Penal Code Cap. 16 R.E.2019, in Criminal Case no. 215 of 2023. Thereat the appellant pleaded not guilty.

Consequently, the prosecution paraded three (3) prosecution witnesses and one exhibit, whereas the appellant fended himself and made a total denial to commit the said act. With respect, the trial court, considered both the evidence of victim with collaboration with the evidence of PW1, PW3 and Exhibit P1 adduced at the trial and was of the view that the

evidence of prosecution was strong enough to prove the case beyond reasonable doubt. Subsequently, the trial court found the accused person guilty and sentenced him to serve thirty (30) years imprisonment.

Aggrieved by the decision, the appellant has stepped to this Court having a total of six grounds and later filed one supplementary ground of appeal. His ground of appeal are as follows;

1. That, the learned trial Magistrate, grossly erred both in law and fact when denied the Appellant of his constitutional right of fair trial by curtailing him the right to cross- examine his co-accused during the defense case, an omission which resulted to a miscarriage of justice against the Appellant and vitiates the Proceedings. Taking into account that the victim (PW2) Mentioned both accused persons.
2. That, the learned trial Magistrate grossly erred both in law and fact in convicting the Appellant basing on weak and tenuous evidence from the victim of the alleged offence (PW2).
3. That, the Learned trial magistrate grossly erred both in law and fact in finding and holding that the Appellant was positively identified / recognized by the victim (PW2) despite the conditions and circumstances being not conducive for proper, correct and unmistaken identification/ recognition.
4. That, the Learned Trial Magistrate grossly erred both in law and fact in failing to note that, the charge was not supported by the evidence on record.
5. That, the Learned Trial Magistrate grossly erred both in law and fact when she shifted the burden of proof to the Appellant by requiring him to prove his innocence.

6. That, the Learned Trial Magistrate grossly erred both in law and fact in convicting and sentencing the Appellant despite the charge being not proved beyond reasonable doubt and to the required standard by the law.
7. That, the Learned Trial Magistrate grossly erred both in law and fact in relying upon the evidence of the victim of the alleged offence (PW2) to convict the Appellant despite the said evidence being taken in total contravention of section 127(2) of the Evidence Act, Cap 6 R.E 2022.

When the appeal came up for hearing, the appellant was represented by Mr. Julius Lukumay, learned advocate while for the respondent Ms. Edith Msenga appeared assisted by Wanda Msafiri.

Addressing the Court Mr. Lukumay prayed to abandon all grounds and argue only one ground that is ground number six. In this ground the appellant complained that the charge was not proved beyond reasonable doubt. It was Mr. Lukumay's submission that the trial Magistrate had sentenced the appellant to 30 years without any law to support the said sentence. He argued that by doing so the trial magistrate had contravened the provision of section 312(2) of Criminal Procedure Act which requires after conviction the judgment to specify the section of the law under which, the accused person is convicted and the punishment to which he is sentenced.

It was Mr. Lukumay's further submission that failure to comply with provision section 312(2) of CPA makes the whole Judgment null and void. He was of the view that the defect is not curable under section 388 of CPA and to support his contention he cited the case of **Aman Funga Bikasi vs. Republic** Criminal Appeal No. 270 of 2008 at page 4.

In his next point Mr. Lukumay submitted that the evidence of the victim (PW2) was not taken in compliance to the law. He argued that it is clear from the record that when victim gave evidence, he was a child of 11 years old, however he gave evidence without oath or affirmation. He further argued that based on section 127 (2) of Tanzania Evidence Act, Cap. 6 R.E. 2022 a child of tender years cannot give evidence without oath unless he promises to tell the truth and not lies. He submitted that this was a contravention of the law and supported his contention with the case of **Mohamed Ramadhan s/o Kolahili vs. Republic** Criminal Appeal No. 396 of 2021 CAT at Dar-es-Salaam which cited with approval the case of **Yusuph Molo vs. Republic** Criminal Appeal No. 343 of 2017.

Arguing further it was Mr. Lukumay submission that in the judgment of the trial court it considered the evidence of the victim as the best evidence

however he argued that the evidence was not taken in accordance with the law as section 127(2) and (6) of the Evidence Act was not complied with.

On the third point, it was Mr. Lukumay's submission that the trial court did not properly address the issue of identification of the appellant by the victim given the fact that the victim stated in his testimony that the incident took place at night hours. He argued that, the record does not show if the victim was asked on the source of light or its intensity so as to eliminate the possibility of mistaken identity. To fortify his point the learned counsel cited the case of **Waziri Amani vs. Republic** 1980 TLR 250, **Said Chaly Scanna vs. Republic** Criminal Appeal No. 69 of 2005 at page 7, and the case of **Deogratias Antipas Silaya vs. Republic** Criminal Appeal No. 24 of 2013 at page 13. It was his submission therefore that since identification was not proved, so the conviction was in contravention of the law.

Still on the same point Mr. Lukumay submitted that the trial Magistrate had frame his own evidence, since during trial the victim himself said there was no light but trial Magistrate when composing the judgment at page 6 said there was light. He argued that the trial Magistrate misconceived the principle established in that case hence it was their prayer that the appeal be allowed and Appellant be acquitted.

Submitting on another issue, Mr. Lukumay said that evidence of PW1 and PW2 were contradicting and inconsistent. Pointing at the contradictions he submitted that PW1 told trial court that on 13/5/2022 at morning hours asked the police to interrogate PW2, at page 8 proceeding but according to PW2 he was sodomised on 10/5/2022 and no anywhere in the record of the trial court, it is shown that victim admitted to be sodomised on 13/5/2023 or that he was taken for interrogation at police station. Also, that PW1 told the court that the victim was 35 years old, but the victim PW2 said he was 11 years old. So, the learned counsel was of the view that the contradiction has merit.

On the last point Mr. Lukumay submitted that the prosecution failed to call material witness to their case. He said, according to the record at page 8 there was one person mentioned by PW1 a Police Officer by the name of Msechu. This is the person who PW1 said he interrogated PW2 at the police station. The learned counsel argued that the said Msechu never appeared to the court to testify on what transpired. He further contended that the evidence of this police officer was crucial in proving the case and that even the trial court itself relied on evidence of witness who did not appear as seen at page 8 of the Judgment on paragraph 3, so he submitted that this

prejudiced the appellant because there was no right to cross examination. He submitted further that the trial court also referred to Eugen Nguma and Msechu that according to PW3 Eugen Nguma was the one who took the victim to Hospital but he was never brought to court as a witness to prove the allegation. It was Mr. Lyimo's submission that these witnesses though not called prejudiced the right of the appellant, therefore he prayed for the judgment to be set aside and the appellant to be released.

Responding to the submission Ms. Msenga submitted that; with regard to failure of prosecution to call material witness. They had a right to choose the witness they wanted and upon their analysis, Msechu being a police officer his evidence would not add value because it would be hearsay and repetition. With regard to Eugen Nguma, she said this was also a parent so they chose one parent to testify. In support she cited for persuasive reasons the case of **Alen Frank Maguzo vs. Republic** Criminal Appeal No. 46 of 2021 at Moshi.

Regarding the issue of contradiction on the age of the victim Ms. Msenga submitted that earlier it was observed that prosecutrix was having a mental problem that is why the father said he was 35 years and he said he was 11 years. Ms. Msenga was of the view that the contradiction was not

fatal given the fact that even the Doctor who testified as PW3 said the victim was 35 years old. She further submitted that it was for this reason the trial court did not consider the requirement of section 127(2) of The Evidence Act.

With respect to the issue of non-citation of the section upon which the punishment was based Ms. Msenga submitted that the trial Magistrate cited section 154(1) (a) of Penal Code because according to this provision the punishment is embedded in it. Therefore, she submitted that this point has no merit.

Finally, regarding the issue of identification, Ms. Msenga submitted that in this case the victim recognized the offender as he knew him before the incident. Therefore, it was Ms. Msenga's submission that the identification in this case was by recognition.

In rejoinder, Mr. Lukumay insisted on what they submitted in their submission in chief and prayed for the appeal to be allowed.

I have gone through all submissions for and against the appeal and now in determining the appeal since the appellant abandoned all the grounds and decided to argue one ground which is the trial court erred by convicting

and sentencing the appellant despite the charge not being proved beyond reasonable doubt.

Arguing this ground the appellant's counsel submitted on a number of issues behind the complaint. In determining the merits or otherwise of this appeal, I will be addressing all the points as raised in appellant's submission. The first point raised is that the trial court had sentenced the appellant without any law to support the sentence. The learned counsel argued that there was non-compliance with the provision of section 312(2) of the Criminal Procedure Act. In my review of the trial court judgment, I found no such error as alleged by the appellant's counsel. Section 312 (2) of the Criminal Procedure Act states;

> *"In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."*

Now, based on the above provision of the law it is clear that the law requires for a judgment to show in case of conviction a specific offence and section of the law under which the accused is convicted. In the present case

the trial magistrate stated at page 8 of the trial court judgment where the appellant was convicted as follows; -

> *"I hereby convict both accused persons from offence charged with. Unnatural offence c/s 154(1) (a) of Penal Code Cap 16 R.E. 2022 and therefore convict them forthwith pursuant to section 235(1) of the CPA R.E 2022"*

Looking at the above quoted paragraph from the trial court judgment it is apparent that the trial magistrate did comply with the provision of the law by specifying the offence that is unnatural offence and the law that is section 154(1) (a) of the Penal Code Cap 16 R.E 2022 upon which the appellant was convicted. This provision provides for the offence and the punishment. The appellant's counsel cited the case of **Aman Funga Bikasi vs. Republic** to support his argument however the cited case is distinguishable with the present case because in that case no conviction was entered against the accused person while in the present case the conviction was rightly entered as already indicated above. It is for this reason I find no merit in this point.

Next point the appellant submitted that the evidence of the victim was taken in contravention of section 127(2) of the Evidence Act. He argued so

because according to him when the victim was giving his testimony, he was a child of 11 years old. As rightly argued by Ms. Msenga the victim was not a child based on the testimony of his father and the doctor who examined him where they both said that he was aged 35 years old. The age difference was explained by the fact that the victim was said to be mentally impaired. This to me is enough proof of the fact that the victim was not a child. I also believe that the trial magistrate had the opportunity of seeing the victim on the witness box and was in a good position to tell if the witness (PW2) was a child or an adult for purposes of satisfying herself as to the competency of such witness and the manner of receiving his evidence in accordance to the law.

Furthermore, the record shows that the evidence of PW2 was received under oath and based on his testimony, it is evident that he was able to understand the questions put to him although due to his mental disability was unable of giving rational answers to them. For this reason, I am of the opinion that he was not a child as the appellant's counsel tries to insinuate. Therefore, the cited cases of **Mohamed Ramadhan s/o Kolahili vs. Republic** and that of **Yusuph Molo vs. Republic** are irrelevant to the

current case since they relate to the evidence of a child of tender years which was not the case in the current matter.

Moving on to the third point the appellant has complained that the appellant was not properly identified by the victim because PW2 did not testify on the intensity of light. While addressing the issue of identification of the appellant, the trial court was of the view that although it was at night, there was light which enabled the victim and the accused to drink alcohol at Manu shop.

It is an established principle that where conditions of identification are unsatisfactory, evidence must be watertight. In order to establish that the identification evidence is watertight there are several factors which need to be considered and they include the time the witness had an occasion to observe the accused; the distance at which he observed him; the conditions in which the observation occurred for instance, whether it was day or night time, whether there was good or poor lighting at the scene of crime, and whether the witness knew or had seen the accused before. (See **Kisandu Mboje vs. Republic** (Criminal Appeal 353 of 2018) [2022] TZCA 425 (14 July 2022).

In the case at hand the record show at page 9 and 10 of the trial court proceedings in examination in chief when PW2 was testifying he told the trial court and for purpose of reference I quote his viva voice;

> *"It was night so I identify 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*".

According to the above evidence of PW2, it means his identification-based assailants' light they had, though the victim did not mention weather was a torch or not, but in my view his evidence remained doubtful on how it assisted him to identify the appellant. I wish to back my view by the guidance by the court in the case of **Gervas Gervas Cosmas @ Chambi and Others vs. Republic** [2023] TZCA 156 TANZLII cited with approval its earlier decisions in **Michael Godwin and Another v. R.,** Criminal Appeal No. 66 of 2002, **Venance Nuba and Another vs. R,** Criminal Appeal No. 425 of 2013 and **Janies Chilonji vs. R,** Criminal Appeal No. 101 of 2003 (all unreported). For instance, in **Venance Nuba** (supra) the court observed that:

*"More often than not, the flash of a torch tends to dazzle the person who is shone at rather than enable such person to see the person who wields the torch."*

Thus, my examination to the above statement in line with the conditions explained by the court of appeal in above cases and that of Kisandu case above, the circumstance in the present case leave doubts as to whether the appellant was well identified, considering the fact that the witness did not explain on the intensity of light that enabled him to identify the appellant. In such circumstance there was possibility of mistaken identity and with such doubt it cannot be said the evidence was water tight. It was necessary for the prosecution to lead the witness to explain how he was able to identify the appellant at night so as to remove all the possibility of mistaken identity. Unfortunately, the prosecution did not do their assignment well and left doubts in the evidence pertaining to the intensity of light which aided the witness to identify the appellant. For this reason, I agree with Mr. Lyimo and find merit in this point.

Having found merit in the point above, and since the above issue of identification is very crucial as per circumstances of this matter. I therefore concede with the appellant that the prosecution failed to prove the charge

against the appellant beyond reasonable doubt and that suffice to dispose of this appeal without much I do.

In the event, the conviction against the appellant is hereby quashed and sentence set aside. Consequently, I order the appellant be set free forthwith if he is not held for other lawful cause.

It is so ordered.

**DATED** at **MOSHI** this day of 5th December 2023.

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

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JUDGE
Signed by: A. P. KILIMI