IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY

AT MOSHI

CRIMINAL APPEAL NO. 57 OF 2022

(Appeal from the decision of the Moshi District Court at Moshi dated 31st August 2022 in Criminal Case No. 435 of 2020)

VICTOR S/O LAURENT MUSHI ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

17th October & 5th December, 2023

A.P.KILIMI, J.:

The appellant Victor Laurent Mushi was charged before the Moshi District Court with one count of unnatural offence contrary to section 154 (1) (a) of the Penal Code. Cap. 16. R.E. 2002. The prosecution alleged that on 16th day of September, 2020 at Uru Timbirini area within Moshi district in Kilimanjaro region, the appellant had carnal knowledge of one EPM (name initialed to protect his identity), a boy aged 10 years old, against the order of nature. At the trial the appellant pleaded not guilty to the charge.

A brief narration of the facts leading to the present appeal is that, on 16th September 2020, EPM was sent out by his mother to go buy some cooking oil at Timbirini area, and on his way, he met with the appellant who asked him where he was going. EPM told the appellant that he was going to Timbirini to buy cooking oil. The appellant offered to show PW1 a short cut way and EPM agreed and followed the appellant who led him and they went through a maize farm. While there inside the maize farm the Appellant took off his trouser and also EPM's trouser and told him to lie down on his stomach and then the appellant inserted his dudu (penis) into EPM's anus. After the act the appellant wore his trouser and went away leaving EPM in pain. Due to the pain, he was feeling EPM wore his trouser half way and went to buy cooking oil then went back home. EPM could not tell his parents because the appellant threatened to kill him if he did. On his way home he met with one Grace Priscus Minde@ Mama Mzungu ("PW2") and according to PW2 she met EPM who was walking while holding his trouser and crying. PW2 asked EPM why he was crying and he told her that he was bitten by a man. He described the man who had bitten him by his physical features and the clothes he was wearing. The following day PW2 informed EPM's father

("PW4"). PW4 informed the Ward Executive officer and then accompanied by the victim they went and arrested the appellant.

Appellant's defense was that on the material day which the crime is said to have been committed he was not at the crime scene rather he was at church on choir practice. From the church he went straight home and did not pass anywhere else. He denied committing the offence and knowing the victim. He said he was arrested at home and that the victim was not present on the day of his arrest but victim's guardian and police officer.

After a full hearing, the trial court found that the prosecution had sufficiently proved the case against the appellant beyond reasonable doubt hence the appellant was found guilty of the offence charged and was convicted and sentenced to life imprisonment. Aggrieved the appellant preferred this appeal to this Court stating 6 (six) grounds as follows;

1. That, the trial Magistrate grossly erred in law and in facts by convicting and sentencing the appellant while prosecution failed to prove their case beyond reasonable doubts.
2. That the trial Magistrate grossly erred in law and in fact by convicting and sentencing the appellant while the Doctor as a medical examiner, not summoned in Court to testify on the allegations leveled against the appellant.
3. The trial magistrate grossly erred both in law and in facts by convicting and sentencing the appellant while the material witness being a Police Investigator in

Criminal case No.435 of 2020 the same, not summoned in Court to testify on the said allegations.

4. The trial magistrate erred both in law and in facts by convicting and sentencing the appellant in absence of any cautioned statement from police proving that the appellant was indeed alleged to have committed the offence.
5. That the trial Magistrates grossly erred in law and in facts by convicting and sentencing the appellant while citing a dead law when conducting the proceedings in Criminal case No.435 of 2020.
6. The trial Magistrate grossly erred in law and in facts by convicting and sentencing the appellant in absence of Identification pared ought to be held as per the requirement of the law.

During the hearing of the appeal, the appellant was represented by Mr. Ulirck Shayo, learned advocate while Ms. Edith Msenga learned State Attorney appeared and argued opposing the appeal for the Republic. After consultation with the parties, it was my directives Mr. Shayo to file written submission in support of the appeal and Ms. Msenga learned state attorney replied orally.

Submitting for the appeal Mr. Shayo consolidated the first three grounds of appeal and argued them together. It was Mr. Shayo's submission that the case against the appellant was not proved beyond reasonable doubt. The learned counsel argued that during trial the trial court offended the

provision of section 127 (2) of the Evidence Act Cap 6 R.E 2019. He contended that the record does not show that the trial court before recording the evidence of the child enquired as to whether he understood the nature of an oath or possessed sufficient intelligence to justify the reception of his evidence and understanding the duty of speaking the truth before concluding that his evidence could be taken on the promise to the Court to tell the truth and not to tell lies.

Mr. Shayo argued further that it cannot be taken for granted that, every child of the tender age who comes before the Court as witness is competent to testify or that he or she does not understand the meaning and nature of an oath or telling the truth before testifying. He further contended that the omission by the trial Court to conduct a brief examination on a child witness of tender age to test his competence and be asked as to whether he/she understand the nature of an oath before jumping to the conclusion that the Victim, PW1 would give unsworn evidence on the promise to tell the truth. He was of the view that such omission is fatal and rendered the evidence of PW1 valueless. Arguing so Mr. Shayo submitted that since the appellant's conviction was solely based on the evidence of PW1, there is no gainsaying that such evidence could not stand to justify a conviction and

sentence against the appellant. It was his submission therefore that the prosecution did not manage to prove the case on the required standard.

It was Mr. Shayo's further submission that there was no evidence showing that the appellant had carnal knowledge with PW1. He argued that in absence of such positive and cogent evidence to establish that the appellant had carnal knowledge with PW1 then the charge against the appellant was not proved beyond reasonable doubt.

Submitting yet on another point the learned counsel stated that the evidence of PW2, PW3 and PW4 was hearsay and incapable of incriminating the appellant of the offence charged because none of these witnesses witnessed the commission of the offence. He also submitted that there was no proof of penetration because neither the medical officer was summoned to testify nor was there a medical report tendered in court as evidence. It was Mr. Shayo's submission that failure by the prosecution side to bring the material evidence and witnesses to collaborate the unsworn evidence of a Child victim raises a doubt on whether it was the appellant who actually penetrated the child as alleged. Emphasizing on the point he submitted that not even the police officer who investigated the offence was called upon to support the prosecution case. The learned counsel was of the view that

considering the nature of the offence, penetration however slight ought to have been proved whereas in absence of that it is apparent that the prosecution failed to prove the case against the appellant beyond reasonable doubt.

On the 4th ground of appeal Mr. Shayo submitted that according to PW3's testimony he alleged that he was the one who apprehended the appellant and took him to a police station but did not name the police station which the appellant was taken and also did not say if the appellant was cautioned and given his rights as provided under section 53(c) of the Criminal Procedure Act Cap 20 R.E 2019, " hereinafter CPA" For this reason Mr. Shayo submitted that the appellant was not apprehended or taken to the police station in respect of the offence alleged to have committed.

Submitting on the 5th ground it was Mr. Shayo's submission that the charge sheet was fatally defective because the appellant was charged under the dead law considering the fact that the particulars of the offence stated that the offence was committed on 16th September 2020 but the charge sheet cited Penal Code Cap 16 R.E 2002 which had already been amended under the Law Revisions Act.

Finally on the 6th ground Mr. Shayo submitted that according to PW3's testimony the appellant was identified by the victim amongst three men who were in appellant's house. He argued therefore that the conduct of identification had contravene the PGO No.232, hence vitiates the requirement under paragraph 2(n) of the law which requires eight or more persons to be present on the parade for the identification of one suspect. He contended that since there was no eight or more-person seen on the parade when the accused person was identified by the victim then it cannot be said that Identification parade was held against the appellant.

Concluding his submission Mr. Shayo stated that there were serious doubts in the prosecution's case and that such doubts cannot sustain conviction and sentence against the appellant considering the charged offence being a serious offence with capital punishment. From his submission the learned counsel prayed for the appeal to be allowed, proceedings and sentence be quashed and the appellant be set free.

Responding on the submission Ms. Msenga started with the 6th ground of appeal which was regarding an identification parade and she stated that identification parade is conducted only if the victim never knew the offender before. She argued that in the present case the victim knew the appellant

before as shown on page 9 of the proceedings where he mentioned his name and also said that he lived nearby. It was Ms. Msenga's submission that when suspect is known to the victim, the requirement of identification cannot arise. She supported her contention with the case of **Majaliwa Gervas vs. Republic** Criminal Appeal No. 608 of 2020. It was for that reason Ms. Msenga prayed for this ground to be dismissed.

Addressing the 5th ground which was regarding citing of a dead law, Ms. Msenga submitted that it was a clerical error which does not render the proceeding a nullity. Furthermore Ms. Msenga submitted that the wrong citation did not prejudice the case of the appellant hence she prayed that the ground be dismissed.

Responding to ground No. 2 and 3 which was relating to failure by the prosecution to summon the police investigator and the medical practitioner, Ms. Msenga submitted that she acknowledges the fact that they were not called to testify. However, Ms. Msenga urged this court to consider that the evidence of sexual offence depends on the evidence of the victim. She submitted that this was in accordance with the case of **Selemani Makumba vs. Republic** and section 127(6) of Tanzania Evidence Act. She further argued that the evidence of these people was extra and that the trial court

could still convict the appellant in absence of the same. To fortify her point she referred to the case of **Kassim Twaha vs. Republic** Criminal Appeal No. 94 of 2017 CAT at Dar-es-Salaam (2019) TZCA 221 TANZLII.

With respect to the 4th ground of appeal regarding the cautioned statement not being brought to court as evidence, it was Ms. Msenga's submission that cautioned statement prepared under sections 52 and 53 of the CPA can be used as evidence only if the accused had confessed to the offence. She argued that in the present case the appellant did not confess that is why the same was not used by prosecution. Ms. Msenga concluded her submission by maintaining that the prosecution did prove their case beyond reasonable doubt by proving that there was penetration against the order of nature and that the victim was a child. She thus prayed for this court to uphold the trial court's decision.

Rejoining the submission, Mr. Shayo reiterated his earlier submission and added that with respect to the issue of identification parade the same was very important because the victim was a child and also because PW3 had said that the accused was called Laurent while in the charge sheet he is called Victor Laurent Mushi.

I have considered the rival submissions of appellant's counsel and respondent's state attorney above, before I dwell on them, I find appropriate to scan the entire record of the trial court to see whether the procedure of administration of justice was fairly conducted.

According to the record the matter at the District court is apparent the whole prosecution case was presided by B.T. Maziku Learned Principal Magistrate which ended on 24/5/2021. Then the next successor Magistrate Jeniffer E. Edward learned Senior Resident Magistrate seems on 18/1/2022 to address the court that the trial Magistrate has been transferred, but later on 5/4/2022 before her as a presiding officer the prosecution prayed to close their case, she consequently marked the case closed and continued to deliver a ruling of a case to answer against the appellant, and further addressed him under section 231(1) (a) and (b) of CPA. Later on 29/4/2022 she preceded with the appellant's defence hearing.

The above means there was a change of one presiding officers in this matter at the trial court. According to law and for purpose of clarity I reproduce section 214 (1) of CPA hereunder;

> *"214 (1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings.*

In my understanding it is trite the above provision sets out two necessary conditions that must be met before a trial proceeds before a successor Magistrate. First, the successor Magistrate must assign reason that should be made known to the accused why the predecessor magistrate could not complete the trial. And second the accused must be informed of his right to resummon the witnesses or any witness, if he so wishes.

I have entirely scanned the record of the trial court nowhere it was recorded that the accused was informed of his right to recall witnesses. What transpired on 18/01/2022 the successor Magistrate merely addressed that the trial magistrate has been transferred but did not continue to address other requirements as provided under the above law. (See **Liamba Sinanga vs. Republic** (1994) TLR 97 and **Priscus Kimaro vs. Republic** Criminal Appeal No. 301 of 2013(Unreported). In **Priscus Kimaro vs. Republic** (supra) the Court had occasion to comment on a similar situation and directed that:-

> "*…where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed."*

Moreover, in **Charles Yona vs. Republic** [2021] TZCA 339 TANZLII the court cited its earlier decision with approval in **Director of Public Prosecutions vs. Laurent Neophitus Chacha & 4 others,** Criminal

Appeal No. 252 of 2018 (unreported), the Court reiterated its stance and stated that: -

> *"... change of trial magistrates is not a simple act to be taken casually but such a serious matter which should be approached with the seriousness it deserves that is to say; whenever it is compelling for a new trial magistrate to take over from a previous one, he must record the reasons for doing so and* ***invite the accused person to express his position if he will require that the witnesses whose evidence had been taken by the previous Magistrate be recalled to testify before a new trial Magistrate.*** *It is also settled law from the cases cited that* ***non-compliance with section 214(1) of the CPA renders the proceedings before the new magistrate a nullity for lack of jurisdiction."***
>
> [Emphasis is mine]

Now, the next point for determination is whether if the above noncompliance of the law has revealed what the appellate court should do in respect to the proceeding of subordinate court. Together with the above

authority also the remedy is provided under the same law by virtue of section 214(2) of CPA which provides as follows;

> *"(2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial."*
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> [Emphasis supplied]

According to the wording of the above provision, since the successor Magistrate at the trial court did not inform the appellant of his right to resummon the witnesses that had testified before her predecessor, she had no jurisdiction to continue with the trial. By not doing so, I am settled that the appellant was duly prejudiced in view of the law above.

Having observed as above, I am of considered opinion the above non requirement of the law vitiated the proceeding at the trial court and by any means it cannot remain as it is for the sake of dispensation of justice. Thus, it is my view the same is enough to make an order of disposing this appeal even without dealing with any ground of appeal raised above.

Therefore, from the above reasoning, I do not see the reason to order a trial denovo. This is because the proceedings before B.T. Maziku Learned Principal Magistrate in above respect was correct, thus, I only nullify the proceeding of successor Magistrate Jeniffer E. Edward learned Senior Resident Magistrate started from 18/1/2022 up to judgment and sentence superintended by her worship.

The above in brief means, I quash the conviction and set aside the sentence imposed to the appellant. In the aftermath, I order the appellant be returned at the trial court for attending the continuation of the case from the point the proceeding nullified as above. Meanwhile the appellant will be subjected to the bail condition of the trial court.

Subsequently, I order the trial case file be returned immediately at the trial court for continuation with the next hearing after the above order. It is so ordered.

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

X

JUDGE
Signed by: A. P. KILIMI