IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAAM SUB REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 110 OF 2023

(*Originating from Criminal Case No. 616 of 2021 of Ilala District Court*)

RAJABU OBADIA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 26/10/2023
Date of Judgment: 10/11/2023

DING'OHI, J.

The appellant, **RAJABU OBADIA,** was charged in the District Court of Ilala at Ilala for an unnatural offense contrary to Section 154(1) (a) and (2) of the Penal Code [Cap. 16 R. E. 2019]. It was alleged that, on the 27th day of August 2021 in the Kipunguni area within Ilala District in Dar es Salaam Region, the appellant had carnal knowledge with XXD a boy of twelve years against the order of nature.

The appellant pleaded not guilty to the charge. Upon a full trial, the trial court found the charge against the appellant proved beyond reasonable

doubt. It convicted the appellant as charged. The appellant was sentenced to life imprisonment. This appeal is against conviction and sentence.

The brief facts of the case leading to the present appeal go like this; At the time the offense is alleged to have been committed the victim was 13 years old. He was a pupil of standard V at Juhudi Primary School. It was further alleged that on 27/08/2021, at or about 7:00 pm at Bondeni Kipunguni area within Ilala District in Dar es Salaam Region, the appellant took the victim and inserted his penis (dudu) into his anus. The victim went and told his father (Obadia Zacharia Paulo- PW3) what the appellant did to him. The PW3 reported the incident at the police station. The appellant was then arrested and charged with the unnatural offense as aforesaid.

The victim was taken to the hospital where he was examined. The medical examination results showed that the victim's anus was loose. It was opined that the looseness of the anus was caused by penetration of the blunt object.

In his sworn defense, the appellant denied having committed the charged offense. He told the trial court that the victim's father had assigned him work for payment of 15,000/=. The appellant and his fellow did the assigned work. However, when they asked for payment they were not paid. In turn, at about 7:00 pm, it is alleged, the victim and his father accused the appellant of raping the victim.

Dissatisfied with the judgment of the trial court the appellant lodged the present appeal comprising seven (7) grounds which are reproduced herein below;

1) *That the learned trial Magistrate court erred in law and in facts convicting the Appellant based on the evidence of Pw1 (the victim) whose testimony was taken in contravention of section 127 (2) of*

the Evidence Act Cap. 6 [R. E. 2019]As the trial court did not ascertain whether or not Pw1 understood the nature of an oath/ affirm, the purported promise recorded was incomplete the omission which renders the same evidence nullity;

2) *That, the learned trial Magistrate court erred in law and in fact in convicting the appellant when the alleged visual identification/recognition evidence by Pw1 (the victim) was barely insufficient and unreliable as it lacked descriptions of the said assailant and explanation of the light in terms of the position and distance from its point to the scene of a crime;*
3) *That the learned trial Magistrate court erred in law and fact in omitting to read out and explain the agreed fact to the appellant in the language that the appellant understands contrary to the procedure of law.*
4) *That the learned trial magistrate court erred in law and in fact in convicting the appellant when the same failed to draw an inference to the prosecution by failing to parade the alleged appellant's father who was the first person to receive the information as asserted by PW1 (the victim) the omission which cast doubt on the prosecution case.*
5) *That the learned trial Magistrate court erred in law and in facts in convicting the appellant when the evidence of Pw2, Pw3, Pw4, and Pw5 are pure hearsay and unreliable to warrant the appellant's conviction as charged.*
6) *That the learned Magistrate court erred in law and in facts in convicting the appellant when erroneous failed to consider and or determine the doubts raised by the appellant during his evidence the omission which resulted in a serious error amounting to a miscarriage of justice and constituted a mistrial.*
7) *That, the learned trial Magistrate court erred in law and in facts in convicting the appellant in a case where the prosecution has grossly failed to prove its charge against the appellant beyond reasonable doubts as mandatorily required by law.*

When this appeal came for hearing, the appellant appeared in person, unrepresented. The respondent was represented by Mr. Adolf Kisama, learned State Attorney.

By consent of both sides, the appeal was ordered to be disposed of by way of written submissions.

In support of his appeal, the appellant submitted that the trial court convicted him based on the evidence of PW1 (the victim) whose age was tender. He was of the view that the trial court did not comply sufficiently with the provisions of section 127 (2) of the Evidence Act. He argued that, at the trial, PW1 was not asked whether he understood the meaning or nature of an oath/affirmation. According to the appellant that could assist the court to make its findings on whether the evidence of the PW1 could be received with or without oath/affirmation. He was of the view that PW1's promise to tell the truth to the court was incomplete as he did not otherwise promise not to tell any lies, as required by the law. In addition, the appellant contended that the court's opinion was ambiguous as the PW1 gave his evidence without knowing the meaning of an oath. To bolster his argument, he cited the cases of **GODFREY WILSON VS. REPUBLIC,** Criminal Appeal No. 168 of 2018, and **JOHN MKONGORO JAMES VS. REPUBLIC,** Criminal Appeal No. 498 of 2020.

Submitting on the second ground, the appellant contended that the evidence of PW1 on the visual identification/recognition was insufficient and unreliable to warrant conviction. He averred that the victim did not give a sufficient explanation of the light in terms of intensity, distance he was, and the position of light at the scene of the crime. To fortify his submission, he referred this court to the case of **REHAN SAID NYAMILA VS. REPUBLIC,** Criminal Appeal No. 222 of 2019.

As regards the third ground of appeal, the appellant contended that the preliminary hearing was conducted in contravention of Section 192 (1), (2),

and (3) of the Criminal Procedure Act [Cap. 20 R. E. 2019]. He submitted that the omission prejudiced him as he was denied the right to know the facts which constituted the offense. As a result, according to the appellant, he failed to prepare a proper and/or well-informed cross-examination and defense evidence against the prosecution case. To this end, the appellant averred that the omission was fatal and unfair since some of the agreed facts differed from testimonies during the hearing. The appellant gave an example of the omission in that during the preliminary hearing, the appellant was 21 years old while during the defense the same appellant was recorded to be 19 years old.

On the fourth ground, the appellant submitted that the learned trial magistrate erred in law for failing to draw an adverse inference to the prosecution evidence for the failure to call his father(appellant's father). He is of the view that his father could testify in court on what transpired on the material date. He contended that his defense as in the trial court records created doubts about the prosecution case as it shows that there were misunderstandings between the appellant and the father of the victim on payments for the shamba work done. The appellant went on to submit that the victim's father was a material witness in this case as he was the first person to receive the information from PW1 on the occurrence of the incident. To substantiate his argument, the appellant cited the case of **HEMED SAID VS MOHAMED MBILU** [1984] TLR 113 where it was held that;

> "*where, for undisclosed reasons, a party fails to call a a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would*

have given evidence contrary to his interest."

Submitting on grounds 5, 6, and 7, grounds of appeal which he consolidated and argued together, the appellant contended that the prosecution side failed to prove the charge against him beyond reasonable doubt. He reiterated what he had submitted in respect of other grounds of appeal herein above in an attempt to show that there were doubts.

In reply, Mr. Kisima, the learned state attorney began to respond to the appellant's submission on the second ground of appeal on visual identification. He contended that since the offense was committed during night hours at around 7:00 pm the issue of proper identity was necessary. According to the learned state attorney, the appellant was un mistakenly identified because the PW1 testified that he knew the appellant even before, as the appellant used to work with his family on agricultural activities. Mr. Kisima submitted further that PW1 testified that on the fateful date, the scene of the crime was surrounded by electricity light from the nearby house with four bulbs thus, the appellant was easily and properly identified with the aid of that particular light. To cement his argument, Mr. Kisima cited the case **CHARLES NANATI VS. REPUBLIC**, Criminal Appeal No. 286 of 2017, CAT. According to the learned State Attorney in the cited case, the Court observed that recognition is more satisfactory, more assuming, and more reliable than identification of a stranger.

Additionally, the learned State Attorney referred this court to the case of **FLANO ALPHONSEMASALU @ SINGU VS THE REPUBLIC**, Criminal Appeal No. 366 of 2018 where the Court observed that in dealing with the

evidence of visual identification, the court should consider the time the witness had with the accused under observation and the question of whether the witness knew or had seen the accused before. As to the case at hand, the learned State Attorney submitted that the appellant was not a stranger to PW1. The PW1 knew the appellant even before the incident.

On the compliance of the provision of section 127 (2) of the Evidence Act, the learned State Attorney submitted that having gone through the proceedings and the findings of the trial court, it is aptly that the requirements of the section were comprehensively complied with. Mr. Kisima averred that the evidence of the victim was corroborated by the evidence of the PW2, PW3, and PW4. It was Mr. Kisima's stance that the evidence of those witnesses was not challenged at all.

Regarding the 5th ground of appeal, the appellant asserted that the trial magistrate omitted to read out and explain the agreed facts to the appellant. In reply, Mr. Kisima explained the aim of section 192 of the CPA. He said that section aimed at accelerating and speeding up trials in criminal cases as per **EFRAIM LUTAMBI VS. REPUBLIC**, Criminal Appeal No. 30 of 1996. The learned State Attorney stressed that noncompliance with the above provision is not fatal as observed in the case of **JOSEPH MUNENE VS. REPUBLIC,** Criminal Appeal No. 109 of 2002.

Submitting against the last ground of appeal which states that the trial court did not consider the defense evidence, the learned State Attorney had the view that the trial court considered the defense evidence as reflected on page 8 of the impugned judgment. He contended further that the appellant was afforded all rights during the trial hence, his complaint is rootless.

Finally, the learned State Attorney prayed that this appeal be dismissed. That, the decision of the trial court over the conviction and sentence against the appellant be upheld.

On a short rejoinder, the appellant reiterated what he submitted in chief. He maintained that the prosecution side failed to prove the charge against him to the required standard.

Having carefully gone through the trial court records, grounds of appeal, and the rival submissions of both parties I am now inclined to determine the merit or otherwise of this appeal.

On the first ground of appeal, the appellant complained that the evidence of PW1 or the victim was taken improperly against the dictates of section 127(2) of the Evidence Act. I have considered that complaint.

Section 127(2) of the Evidence Act provides that;

> *"(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."*

I think the relevant issue now is whether the requirements of section 127(2) of the Evidence Act were complied with by the trial court when taking the evidence of PW1.

For the purposes herein it is crucial to have an excerpt of what the PW1 stated when the trial court cross-examined him on his promise to tell the truth;

> *"PW1: Chacha Obia 13 years old, resident*

of Kipunguni student (STD) at Juhudi Primary School.

Court: what do your teacher do when you tell the untruth statement PW1: they usual beat me

Court: telling the truth is a good thing or bad one?

PW1: it is bad thing

Court: what is the name of your class teacher

PW1: he is called Mkumbage

Court: Are you promise to tell the truth before this court.

PW1: yes, I promise to tell the truth.

Looking at the excerpt above, it is clear that the victim promised to tell the truth without promising not to tell lies. It is trite law that before the witness of tender age is allowed to give evidence he should promise to tell the truth and not to tell the lies as per section 127(2) of the Evidence Act. See the decisions in the cases of **GODFREY WILSON VS. REPUBLIC** (supra) and **JOHN MKONGORO JAMES VS. REPUBLIC** (supra).

As I have shown herein above the victim (PW1) promised to tell the truth. However, he did not promise that he would not tell any lies. I find that the omission is not fatal because promising to tell the truth implies that the witness would not tell any lies. The Court of Appeal of Tanzania sitting in the case of **MATHAYO LAURANCE WILLIAM MOLLEL VS. THE**

REPUBLIC, Criminal Appeal No. 53 of 2020 (Unreported) dealt with the akin situation to the present matter. It 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".*

Based on the above observation, I am convinced that the learned trial magistrate complied with the provisions of Section 127 (2) of the Evidence Act before he received the evidence of PW1. To that end, I find the first ground of appeal without substance. It is hereby dismissed.

The second ground of appeal tends to challenge the evidence of PW1 which is based on visual identification. It is the appellant's case that the evidence was insufficient and unreliable to warrant his conviction.

I have considered that. In our jurisdiction, the Court of Appeal of Tanzania and this court on different occasions have deliberated a lot on the issue of the proper identification of the accused person at the scene of crime especially on unfavorable conditions. In the landmark case of **WAZIRI AMANI V. REPUBLIC** [1980] TLR 250, the Court of Appeal of Tanzania mentioned matters the court should take into consideration when dealing with the issue of the identification of the accused person. The Court observed:-

> *"We would, for example, expect to find on record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night time, whether there was good or poor lightning at the scene; and further, whether the witness knew or had seen the accused before or not. These matters are but a few of the matters which the trial judge should direct his*

mind before coming to a definite conclusion on the issue of identity".

Additionally, in the case of **JUMAPILI MSYETE VS. THE REPUBLIC**, Criminal Appeal No. 110 of 2004 (unreported) the Court of Appeal of Tanzania listed three categories of identification. It observed as follows;

> *"for the purpose of analysis and the experience enriched from case law, cases of identification may be identified into three broad categories namely visual identification, identification by recognition, and voice identification".*

My response to this complaint will be centered on the above guiding principles of identification and the gathered evidence by the trial court. PW1 knew the appellant before the occurrence of the incident. It is on record that they used to conduct agricultural activities together like planting vegetables. Furthermore, I am convinced that four electricity bulbs from the nearby house to the scene of the crime provided enough light for the victim to identify the appellant properly. To that end, the evidence on visual identification and identification by recognition by the victim makes this court believe that there was no possibility of mistaken identity of the appellant. On top of that, the time spent by the appellant during the commission of the offense was enough for the victim to identify him properly. Based on the above evaluation it is my settled view that the appellant's complaint on the visual identification against him is

devoid of merit. I find that the appellant was properly identified as found by the trial court.

There is also a complaint by the appellant that the trial magistrate omitted to read over the facts of the case during the preliminary hearing. I have considered that complaint as well. I think that should not detain me longer. It is now settled law that non-compliance with the requirements of the Preliminary Hearing under section 192 of the Criminal Procedure Act does not vitiate the trial. That is to say, in simple and open words, conducting a preliminary hearing is not as mandatory as it used to be. See, **EFRAIM LUTAMBI VS. REPUBLIC** (supra).

The complaint over the failure to properly conduct the preliminary hearing is redundant. It is hereby dismissed.

More so, regarding the fourth ground of appeal, the appellant complained that the prosecution side failed to parade his father (the appellant's father) to testify during the trial. I failed to understand the basis of this complaint. It is my settled position that the duty to call a material witness lies on the party who desires to prove the relevant facts in his/ her favor. Additionally, in sexual offenses, the best evidence comes from the victim; See, **MAKUMBA SELEMANI**(supra). In the present matter, the victim testified as to what happened between him and the appellant. His testimony, in my view, was straightforward. For example, the victim explained what the appellant did to him in the following words; *"he raped me. He removed his dudu from his trouser and inserted it sehemu yangu ya kunyea we were at Bondeni area at Kipungu".* The evidence of PW1 was corroborated by the evidence of

PW4, a medical doctor, who examined the victim. In his evidence, the PW4 told the trial court that after his examination, he found the victim's anus penetrated by a blunt object. That evidence proved the offense against the appellant in the trial court. I am aware that the appellant complained that the prosecution side also failed to call his father (appellant's father) to give evidence on what happened on the date alleged the offense was committed. Without beating about the bush, I am of the settled view that it was not the duty of the prosecution side to parade the appellant's father to prove the charge against the appellant. If he found it appropriate the appellant could have called that witness to testify on his side.

As to the complaint that the trial court failed to consider the defense evidence I will disagree with the appellant on that. The record is more than clear that on page 4 of the impugned judgment, the learned trial magistrate objectively evaluated the defense evidence before he found the appellant guilty of the offense. That complaint is as well without a holder. It is hereby dismissed.

That said and done, I find that the trial court was justified in finding that the prosecution side had proved the charge against the appellant. The appellant was properly convicted and sentenced.

This appeal will therefore not succeed. It is hereby dismissed in its entirety.

S.R. DING'OHI

JUDGE

10/11/2023

COURT: Judgement delivered at Dar es Salaam this 10th day of November, 2023 in the presence of Mr. Adolf Kisama, learned State Attorney for Republic/ respondent and the appellant who has appeared in person and unrepresented.

S.R. DING'OHI

JUDGE

10/11/2023