IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISRTY

AT DAR ES SALAAM

CRIMINAL APPEAL NO 157 OF 2023

EZEKIEL PROTAS CHARLES.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

MKWIZU, J:

The Appellant Issa Ezekiel Protas Charles was arraigned before the District Court of Kigamboni at Kigamboni with an offence of Unnatural Offence contrary to section 154(1) (a) and (2) of the Penal Code [Cap 16 R: E 2022]. It is alleged that on unknown date, at the Vijibweni area within Kigamboni District in Dar es Salaam Region, the appellant did have carnal knowledge of his neighbour, a boy aged 5 years against the order of nature.

On the material date, the victim was on the playground playing with another person when he was called by the accused who sent him to a shop to buy him a soap. On his return, the victim was ordered to get inside the accused house, the door was closed, the accused stripped of his clothes and that of the victim followed by carnally knowing the victim against the order of nature. The victims narrated the ordeal to his mother (PW1) who relayed the information to the victim's father(PW3) and to Kigamboni police station

where the victim was issued with a PF3, and taken to the hospital where he was medically examined by the Doctor (Pw4) who filled a PF3 which was admitted in court as exhibit P2. Upon a full trial, the appellant was found guilty, convicted, and sentenced to life imprisonment.

The appellant is aggrieved. He has appealed to this Court against both conviction and sentence on five grounds of appeal challenging the trial court's decision for:-

(i) Failure by the prosecution to parade Muwadha (victim's friend) as the material witness to testify before the court.

(ii) Grounding a conviction on a defective charge that is silent on the time of the commission of the offence.

(iii) Failure by the trial court to consider the defence

(iv) Failure by the prosecution to prove the case beyond reasonable doubt.

At the hearing of the appeal, the appellant was in person without legal representation, while the respondent/ Republic, was represented by Ms Gladness Senya learned State Attorney. With the leave of the court, the appeal was disposed of by written submissions.

The appellants' written submissions were opened by one additional ground of appeal questioning the PW2's evidence for being taken contrary to the provisions of section 127 (2) of the Evidence Act, Cap 6 RE 2022. It was contended that the victim (PW2) was taken without a finding that the victim knew the meaning of oath or affirmation. He relied on the decision of

Godfrey Wilson V R, Criminal Appeal No 168 of 2018 (Unreported) asking the court to expunge PW2's evidence from the records for lacking evidential value.

In the 1st and 4th grounds of appeal the appellant is complaining of failure by the prosecution to prove the involvement of the appellant in the commission of the offence. His point is because no explanation as to why the ordeal was never reported to neighbours, tenants, and local authorities of the area who would assist the prosecution in establishing the veracity of the evidence by PW1 and PW3 the witnesses with interest to serve. He also suspects the prosecution's failure to parade the investigator as a witness stressing that this omission casts doubt on the prosecution evidence. To bolster his argument, he cited to the court the case of **Boniface Kundakira V R**, Criminal appeal No 350 of 2008(Unreported), and **Hemed Said Mohamed Mbilu V R** (1984) TLR 113.

The appellant's contention in ground 2 is that the charge is defective missing important information on the date of the commission of the offence contrary to sections 132 and 135 of the CPA rendering the particulars of the charge a nullity. He on this relied on the case of Mussa **Mwaikunda V R**, (2006) TLR 387. And he on grounds 3 and 5, blames the trial court for failure by the prosecution to prove the case beyond a reasonable doubt. His contention here was that had the trial court considered the evidence adduced he would have concluded in favour of the appellant that the prosecution case was not established to the tilt. He finally urged the court to allow the appeal, quash the conviction, and set aside the sentence with an order or his release from prison.

The learned State Attorney on the other hand was in support of the conviction and sentence. Arguing the additional ground of appeal brought through the appellant's written submissions, she said, the procedure for recording the evidence of a witness of a tender age is provided for under section 127 (2) of the Evidence Act that prior to giving evidence the witness must promise that he would tell the court the truth and not lies the procedure that was properly complied with in this case where PW2 was led to promise that he would speak the truth and not lies after his understanding of the meaning of oath was assessed by the trial court as articulated in **Mathayo Laurence William Mollel V The Republic**, Criminal appeal No 53 of 2020.

He on the 1st ground stated that Muwadha was not a material witness and that even if he was to be called, his evidence would not have proved the offence. He contended that it is not a number of witnesses that matters but the credibility and weight of the evidence given. Section 143 of the CPA, Cap 20 Re 2022 and the decision of **Bakari Hamis Ling'ambe V R**, Cr. Appeal No. 161 of 2014 was cited on this point. The learned State Attorney maintained that the best evidence in sexual offences is that of the victim who in this case gave clear evidence that was corroborated by her mother (Pw1) and the Doctor (PW4).

Regarding arguments on a defective charge, the State Attorney said, though the charge has no date and time of the commission of the offence, prosecution witnesses managed to establish that the incident was committed in October 2022.

On failure by the trial court to consider doubts that were raised by the defence case, as raised in the 3rd ground of appeal, the learned state attorney argued that the defence was properly considered and was disregarded for being an afterthought for the appellant did not question the prosecution witness on the facts he later brought in his defence.

The learned State Attorney was of the view that the last two grounds of appeal are unmerited because the prosecution managed to establish their case beyond a reasonable doubt. He posited that having been carnally known, the victim informed his mother who relayed the information to her husband and later to the police.

I have dispassionately considered the appeal. The complaint in the additional ground relates to the procedure used by the trial court in recording PW2's evidence. The appellant's contention is that the trial court did not adhere to the procedure stipulated under section 127 of the Evidence Act. The appellant was specific in his submissions that the provision requires the court to first examine the child to establish whether he understands the meaning and nature of an oath followed by definite findings on whether the child understands the meaning and nature of an oath or not and that the child would only be required to promise to tell the court the truth and not lies if he doesn't understand the meaning of oath. His complaint here is categorical that PW2 was not asked if he understood the meaning of oath or affirmation and no findings were made to that effect rendering the evidence recorded from PW2 without value. The learned state attorney maintains that the trial court complied with the dictates of the law.

Indeed, it is the law that before a tender-aged witness in a criminal case is asked to promise to tell the court the truth and not lies, the child victim must be assessed to detect his understanding of the nature and the meaning of the oath. This position is affirmed by the Court in **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (unreported) the Court held:

> *"... where a witness is a child of tender age,* ***a trial court should at the foremost, ask a few pertinent questions so as to determine whether or not the child witness understands the nature of oath****. If he replies in the affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such a child* ***does not understand the nature of the oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies****. "[Emphasis added]*

In this instant case, PW2 was asked simplified questions as to his name, age school, the religion he is professing, and whether he understands the difference between speaking the truth and lies before he was required to give his promise that he would speak the truth and not lie. When asked about his religion, PW2 seemed to have no clue on what he was professing which moved the trial magistrate into asking whether he knew the difference between telling the truth or not. This, in my view was in total compliance to the provisions of section 127 (2) of the Evidence Act as articulated in **Godfrey Wilson Vs Republic,** Criminal Appeal No 168 of 2018(All unreported)

"The trial magistrate ought to have required Pw1 to promise whether or not she would tell the truth and not lies, we say so because section 127(2) as amended imperatively requires a child of tender age to give a promise of telling the truth and not telling lies before she /he testifies in court. This is a condition precedent before reception of the evidence of a child of tender age.

Speaking on how the court should arrive at receiving such a promise from a witness of tender age, the court said:

"The question, however, would be how to reach the stage.We think the trial magistrate or Judge can ask the witness of tender age such simplified questions which may not be exhaustive depending on the circumstances of the case, as follows;

1. *The age of the child.*
2. *The religion that the child professes and whether he/she understands the nature of the oath.*
3. *Whether or not the child promises to tell the truth and not lies thereafter upon making the promise, such promises must be recorded before the evidence is taken."*

The omission in recording the findings on whether the child witness understands the meaning and the nature of an oath was not fatal under the circumstances of this case, where the child was even not aware of his belief that would have formed the basis of his oath. The additional grounds therefore fail.

I also find the issue regarding the failure of the prosecution to parade Muwadha (the victim's friend), the neighbors, local leaders, and the investigator as the material witness to testify before the court as unmeritorious. As rightly submitted by the learned State Attorney, section 143 of the Evidence Act does not require a specific number of witnesses to prove a certain fact. In criminal cases, the burned to prove the case is shouldered on the prosecution who retains the discretion on the selection of witnesses who are relevant to prove facts at issue. In that sense, the prosecution is not bound to call every witness who came on their way or who had in one way or the other participated in the investigation or would have been expected to so feature. Their duty is only to prove the case, or any facts that they propose that it had happened. This position was stated in **Yohanis Msigwa V R**, [1990] TLR 148 on page 148 where it was held:

> *"As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility."*

I have examined the circumstances under which the alleged offence was committed. There is nothing in the records suggesting that the local leaders, neigbours and the investigators were essential witnesses without whom the case would not have been proved. I say so because Pw2, victim is the only eyewitness of the sexual act that was committed against him. There is no other witness who would have come to court to establish whether the alleged sexual offence was actually committed or not. The neighbors, local leaders if called would only have come to court with hearsay evidence on this crucial

aspect. The investigator as well would not have under the circumstances of this case told the court any substantial evidence on who and how the act was committed. It should be remembered that this being a sexual offence, the star witness is the victim. See **Selemani Makumba v. Republic**, [2006] T.L.R. 379. I do not as well find merit on this complaint.

The issue of a defective charge should not delay the court further. I agree with the learned State Attorney that the charge was not at variance with the evidence. This is because, while the charge sheet was silent on the date, time, and month of the incident, it particularly is specific that the offence was committed sometime in the year 2022, the facts that is squally established by the prosecution witnesses. PW1, for instance, told the court that she learnt of the incident in October 2022 and PW4, the Doctor said he examined the child on 3/10/2022 the facts that were supported by the appellant himself during his defence where he informed the court that he was arrested on 2/10/2022 at midnight. This point is without merit.

The two last points are intertwined to the effect that the prosecution case was not proved to the tilt. The evidence to establish that the victim was sodomized came from PW2 the victim of the offence of unnatural offence. On page 22 of the proceeding PW2 (victim) explained how the offence was committed that he was called by the accused, sent to the shop to buy soap, and that on his return, the accused called him inside the house where he stripped him naked, procured his penis which he inserted into his anus. This incident was reported to PW1, who relayed it to the Police leading to the arrest of the accused person.

The evidence on penetration as an essential ingredient of rape was corroborated by PW4, the doctor who confirmed that after the examination he found the victim penetrated. On 30 of the proceedings PW4 was recorded to have said,

> *"I physically examined the child in his anus. I observed that the child's anus muscle was loose, and I saw bruises.*

The trial Magistrate went a step further to consider the appellant's defence on the alleged claim that the victim's mother owed him money (motorcycle fare)) The trial court findings were that the appellant's defence was brought in court as an afterthought. I share the same view, had it been true that the appellant's accusations were a result of the victim's mother who owed the appellant money, that fact would not have escaped the appellant's mind during cross-examination just to come alive during the defence. The defence evidence had no effect on the prosecution case.

Consequently, the appeal is dismissed for lack of merit.

Dated at **Dar es salaam**, this **27th Day** of **October 2023**

E. Y Mkwizu
Judge
27/10/2023