IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]
AT ARUSHA

CRIMINAL APPEAL NO. 83 OF 2023

(Originating from the District Court of Arumeru, Criminal Case No. 65 of 2022)

ELIAS LESIKARI NDASIKOI ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

25th January & 28th March 2024

MWASEBA, J.

The appellant was aggrieved by both conviction and sentence imposed on him by the District Court of Arumeru (hereinafter the "trial court"), which was handed down on 11/01/2023. In the trial court, the appellant was arraigned there, charged with the Unnatural Offence contrary to **Section 154 (1)(a) and (2) of the Penal Code,** Cap. 16 [R.E 2022] (hereinafter "Cap. 16").

It was alleged by the prosecution that on diverse dates of October 2022, at Kwa Onyango, Ngaramtoni area within Arumeru District and Region of Arusha, the appellant had carnal knowledge of KWL, (name withheld to conceal his identity) a boy of eight (8) years old, against the order of nature. He was convicted and sentenced to serve life imprisonment.

The background facts of the case leading to the appellant's conviction and sentence, giving rise to this appeal can be summarized as follows: KWL, a standard III pupil and the victim testified as PW1, informing the trial court that the appellant who appeared to be a neighbour at his father's residence, did bad habit to him. Giving details of what he described as bad habit, PW1 stated that it was another occasion when the appellant approached him, requested Amani so that the victim could assist him to pick the keys in his house through the window. The victim heeded the call, entered the house through the window. To his surprise, the victim opened the door and was inside already. He commanded the victim to undress his clothes, but the victim declined excusing himself that he was going to perform some house chores. The appellant undressed his clothes, undressing the victim as well, and ordered him to lie on his stomach (freefall position). The appellant inserted his penis in the victim's anus, threatening him that if he made any noise, he would kill him.

PW1 accounted that on another occasion, the appellant found him with his brother making tea. The appellant told PW1's brother that he wanted the victim to go and buy him buns. After the victim had complied, the appellant demanded the victim to take the buns inside his house. When the victim did so, the appellant closed the door, demanding

that they perform the weird act from the innocent boy who could not resist in the following terms: *"Njoo basi tufanye kidogo".* Instantly, the appellant undressed the victim, undressed his. He took the victim to bed and started sodomising him. According to PW1, he did not disclose the ordeal to anyone because he was threatened by the appellant.

On unknown day, there was a training which aimed at building awareness in respect of sexual abuse matters at the victim's school. They were separated the boys from the girls. They were called upon to report any sexual abuse that they might have faced, either by speaking it loudly or by writing on a piece of paper. The victim was a man enough to report the untold information he kept abreast for a couple of days. He wrote the name of the appellant on a piece of paper as the person who ravished him and surrendered the paper to teacher Mlay. He was told to call his parent whereas his uncle reported at school.

Wilson Luibangudi (PW3) and the victim's father was summoned at school. He was directed to take the victim to the police station where he was issued with a PF3. He took the victim to Oltrumeti hospital on 24/10/2022. After the victim was attended, they retired back home. According to PW3, the appellant was arrested by civilians on 24/10/2022. To prove that he was the victim's father, he tendered the clinic card which was admitted as exhibit P2.

At Oltrumet Hospital, the victim was attended by Japhet Stanley Champanda (PW2). He made both physical as well as digital examination on the victim. The physical examination showed that the victim had bruises on the surface of the anus. The digital examination revealed that sphincter muscles were a little loose. He also conducted HIV and Hepatitis examinations which showed that the victim was negative. He filled in the PF3 on 25/10/2022, which was admitted as exhibit P1. Jane Kitundu Maudi (PW4), was assigned the case file to investigate by ASP Doya at Ngaramtoni Police Station. She gathered evidence and forwarded the file to the National prosecution Service for further legal action.

In his sworn defence, Elias Lisikari (DW1) distanced himself from the incident. He raised the defence *alibi* stating that on 24/10/2022 he was at his uncle's house. At 04:00, he arrived back home. He asked his brother to allow him so that he could go to Ngare market to take his clothes. He was allowed. When he was on his way back, he passed through Mringa Primary School. He was eventually arrested by the victim's father, who accused him of stealing his money. He took him to the police station. Loserian Ngosei Mollel (DW2) gave a similar account adding that he never heard of the sodomy incident, he only heard of the arrest of the appellant. After the appellant was released on bail, DW2

asked him if he committed the offence but the appellant assured him that he did not participate in the ordeal.

After full trial, the trial magistrate was sufficiently convinced that the case against the appellant was proved beyond reasonable doubts. The appellant was therefore convicted and sentenced as above indicated. Protesting for his innocence, the appellant has knocked the doors of this court armed with nine grounds of appeal, couched in the following terms:

a) *That, the trial court erred in law and fact in not complying with the requirement of section 160B of the Penal Code, Cap. 16 [R.E 2022] as the appellant was sentenced to more than what he deserved because at the time of commission of the offence, the appellant was at the age of eighteen years old (18);*
b) *That, the trial court erred in law and fact in not complying with the requirement of section 127(2) of the Evidence Act, Cap. 6 [R.E 2022] as the promise by PW1 to the court on the promise to speak the truth and not lies, was never preceded by preliminary questions by the trial court and was vaguely incomplete;*
c) *That, the trial magistrate erred to convict the appellant of the charged offence as age of the victim was not proved beyond reasonable doubt;*
d) *That, the honourable magistrate erred in law and facts to believe that PW1 (victim) was credible despite failure to report the crime at earliest opportunity;*

e) *That, trial court erred in law and fact in not finding that the evidence of PW1 (victim) and PW4 (police investigator) was recorded in contravention of section 210(1)(a) of the Criminal Procedure Act, Cap. 20 [R.E 2022];*

f) *That, the trial court erred in law and fact in convicting the appellant on the basis of the evidence of PW1, PW2 and PW3 who were incredible, unreliable and uncorroborated;*

g) *That, the trial court erred in law and fact in not finding that failure by prosecution side to call the said Amani, teacher Mlay and brother of PW1 who could prove the allegation against the appellant warrants drawing an inference adverse to the prosecution;*

h) *That, the appellant's defence of alibi was not considered; and*

i) *That, the case against the appellant was not proved to the standard required by law.*

At the hearing of the appeal, the appellant appeared in court in person, unrepresented while the respondent Republic was represented by Ms Amina Kiango, learned State Attorney. Hearing of the appeal was through filing of written submissions.

Submitting in support of the 1st ground of appeal, the appellant contended that in terms of **Section 160B of Cap. 16**, a child who is under the age of 18 years once convicted with criminal offence should be sentenced to corporal punishment. He alluded that at the time of commission of the offence, he was at the age of 18 years, pressing that he ought to have been sentenced to corporal punishment and not life

imprisonment as contemplated by the trial magistrate. To reinforce his contention, he referred the case of **Zuberi Mkapa v. Republic**, Criminal Appeal No. 363 of 2020 (unreported), at pages 19 & 20.

Elaborating the 2nd ground, the appellant submitted that the victim of the offence (PW1) before testifying was not tested whether he understood the nature of oath and the duty of speaking the truth and not lies before the court. He underscored that there were no simple questions put to him despite the record bearing that he did not understand the nature of oath but he promised to tell the truth. It was his stance that the questions put to him to test whether he did not understand the nature of oath are not reflected in the record, hence he urged the court to discard the evidence of PW1, relying on the Court of Appeal decision in **John Mkorongo James v. Republic**, Criminal Appeal No. 498 of 2020 (unreported).

Amplifying the 3rd ground, the appellant asserted that the charge facing him is unnatural offence, whose sentence is either thirty years imprisonment or life imprisonment depending on the age of the victim. At the trial court, the victim's age was not proved as none of the prosecution witnesses who described the age of the victim, challenging the sentence imposed by the trial court as it was improbable and doubtful since the victim's age was uncertain.

Submitting on the 4th and 6th grounds conjointly, the appellant averred that the victim testified that the appellant sodomised him more than once. However, he was of the view that the victim did not disclose the evil act as soon as practicable, rendering his credibility questionable. Similarly, the appellant challenged the evidence of PW2 stating that he was not credible witness since he failed to prove that the victim was penetrated. He further found the victim without any pain therefore he was not given any medication. To nail it all, the appellant faulted the evidence of PW3 and PW4 for being hearsay as none testified to have witnessed the offence while being committed, therefore deficient to warrant the appellant's conviction.

In respect of the 5th ground, it was the appellant's contention that the trial magistrate casually recorded the evidence of the prosecution witnesses because as soon as he finished recording the evidence of each prosecution witness, he did not inscribe his signature. That mandatory requirement of **Section 210(1) of the CPA** was not complied with; hence he prays that the evidence of the prosecution witnesses which was recorded in contravention of the said provision be expunged.

Expounding the 7th ground, the appellant blamed the prosecution for failure to summon the key witnesses such as Amani, teacher Mlay and the victim's brother, whose evidence was crucial to corroborate that

of PW1. Failure by the prosecution to summon the said witnesses without advancing reasons, rendered some crucial matters unresolved, the appellant submitted.

Amplifying the 8th ground, the appellant faulted the trial magistrate for failure to give due consideration to the defence of *alibi*, that he raised. He accounted that in his testimony he stated in clear terms that at the time the offence is alleged to have been committed, he was at his uncle's place and not at his house. His uncle's evidence corroborated his version; however, the trial magistrate ignored the defence.

Explaining the last ground, the appellant submitted that there was variance between the charge sheet and the evidence adduced in respect of the crime scene. While the charge sheet shows that the offence was committed at Kwa Onyango Ngaramtoni the proceedings showed that the victim resided at Maili Sita-Ngaramtoni. Surprisingly, at page 15 of the typed proceedings, the victim's father stated that he lived at Olasiva. In his view, the variance rendered the charge defective referring **Section 234(1) of the CPA**. Based on his submission, the appellant urged the court to find merits in the appeal and allow it.

On her part, the learned State Attorney supported the conviction and sentence by the trial court. Resisting the 1st ground, she contended that the appellant misconstrued the provision he relied on because that

provision relates to offences committed by children below 18 years old while the appellant admitted that at the time the offence was committed, he was 18 years. She pondered that the appellant cannot be covered by the scope of the provision. She insisted that the appellant's age was not in dispute, hence not subject to be covered by **Section 160B of Cap. 16**.

In response to the 2nd ground, it was Ms Kiango's submission that prior to reception of the evidence of PW1, the trial magistrate tested whether the victim understood the meaning of oath which he resolved that he did not. Second, he inquired whether the victim understood the duty of telling the truth and not lies and he was certain that the victim understood the meaning of truth. He proceeded to record the victim's promise to tell the truth in active voice, which connotes that the provision was complied with. Despite the learned State Attorney's concession that the questions put to the victim by the trial magistrate to test his culpability were not recorded in the proceedings, she was quite certain that the omission is curable under **Section 127(6) of the TEA**. To cement her proposition, she relied on the Court of Appeal decision in **Wambura Kiginga v. Republic**, Criminal Appeal No. 301 of 2018 (unreported), which underscored that even an incomplete promise by the child of tender age not to tell lies, the fact that he promised to tell

truth and proceeded to tell the truth falls squarely under the provisions of **Section 127(2) of TEA.**

In response to the 3rd ground, the learned State Attorney submitted that the age of the victim was proved by the evidence of PW3 which was corroborated by exhibit P2. She stressed that the proof of the age of the victim in sexual offence cases may come from either the victim, the parents, guardian, production of birth certificate or other documentary evidence. PW3 being the victim's father and exhibit P2 being his clinic card, sufficiently proved the age of the victim.

Responding to the 4th and 6th grounds, Ms Kiango amplified that the offence was committed in October 2022 and PW3 was informed of the same on 24/10/2022, that is within the same month. She therefore urged the court to find the delay to report the crime not ordinate. She was also quick to point out that PW1 was clear in his evidence that he was threatened not to disclose the ordeal to anyone. That exempts him from being captured by the rule on delay to report the crime, relying on the Court of Appeal decision in **Wilfred Andaisai Mmari v. Republic**, Criminal Appeal No. 164 of 2020 (unreported). Similarly, the learned State Attorney contended that the role of PW2 was to examine and confirm whether the victim was penetrated, which he did as his observation was recorded in exhibit P1. In the absence of pain, it is not

a justification to discredit the evidence of PW1, hence the trial magistrate was justified to believe him, she submitted. She referred the court to the case of **Godluck Kyando v. Republic** [2006] TLR 363 to strengthen her arguments.

Arguing the 7th ground, Ms Kiango fortified that the appellant's submission was vague as he did not disclose the facts which needed to be corroborated by the uncalled witnesses. She relied on **Section 143 of TEA** to justify that it is not the number of witnesses which matters, but the substance of the evidence adduced. She insisted that the prosecution played its part by calling the witnesses who were crucial to prove the offence the appellant stood charged and they managed to prove the offence to the standard embraced in criminal jurisprudence.

Resisting the 8th ground, the learned State Attorney made reference to page 7 and 8 of the typed judgment stating that while resolving the issues raised, the trial magistrate referred **Section 194(4) of TEA** to disregard the defence of *alibi* since it was not in conformity with the law as there was no prior notice. She prayed that this court confirm the findings of the trial magistrate in this respect.

Demonstrating the last ground, it was Ms Kiango's argument that the elements the prosecution were duty bound to prove included the age of the victim and penetration in order to prove the unnatural

offence. She was confident that the elements were proved by PW1, whose substance of evidence was corroborated by PW2 and PW3. Regarding the variance of the place the offence was committed, she regarded it inconsequential, referring Ngaramtoni as the actual place where the offence was committed. On totality of her submission, the learned State Attorney prayed that the appeal be dismissed for being devoid of merits.

In rejoinder submission, the appellant reiterated his submission in chief with very minimal elaboration. He accounted that teacher Mlay was material witness because he was the first person to whom the victim reported the matter.

After revisiting the grounds of appeal, the submissions by both the learned State Attorney and the appellant, I am now in a position to determine the appeal in the modality utilised by the parties in arguing the grounds of appeal.

In the 1st ground, the appellant faulted the trial magistrate for sentencing him excessively without observing the dictates of **Section 160B of the Cap. 16**. He complained that at the time of commission of the offence he was 18 years, therefore he ought to have been sentenced to corporal punishment. On her part, the learned State Attorney was furious that the said provision does not cover the appellant who was 18

years old at the time of commission of the offence. Apparently, in order to appreciate the controversy between the parties herein, I find it apposite to reproduce the relevant provision for easy of reference. It states:

> *"160B. For promotion and protection of the right of the child, nothing in Chapter XV of this Code shall prevent the court from exercising-*
> *(a) reversionary powers to satisfy that, cruel sentences are not imposed to* ***persons of or below the age of eighteen years****; or*
> *(b) discretionary powers in imposing sentences to persons of or below the age of eighteen years."* Emphasis added)

The above provision restricts imposition of cruel punishment to persons of or below the age of 18 years. According to the record, it is apparent that the appellant was 18 years old at the time he was alleged to have committed the offence. In his submission, the appellant admitted that fact. The learned State Attorney as well conceded that the appellant was 18 years at the time of commission of the offence. However, she was of the view that the provision did not cover persons with the age of 18 at the time of commission of the offence, rather those below that age.

At the outset, I am not convinced with the line of argument preferred by the learned State Attorney because the provision indicates

in clear terms that it covers persons of 18 years and those below. Perhaps, and without prejudice, the learned State Attorney might have misconstrued the provision when she said that it does not cover persons of 18 years of age at the time of commission of the offence. Strict interpretation of the provision which has no any ambiguity entails that it covers those of 18 years of age and below.

Fortunately, the Court of Appeal had opportune to interpret the above provision when faced with akin scenario in the case of **Zuberi Mohamed @ Mkapa v. Republic** (supra), which was referred by the appellant. In that case the Court observed:

> *"As we intimated earlier, the appellant was sentenced to thirty (30) years imprisonment despite his age at the time of commission of the offence. We agree with the counsel for both sides that in terms of the above provision,* ***since the appellant was of the age of 18 years at the time of commission of the offence, upon conviction he was supposed to be sentenced to corporal punishment, but that was not the case****. Failure to observe the dictates of the law in our considered view, occasioned miscarriage of justice on the part the appellant as he was sentenced to more than what he deserved."* (Emphasis added)

Circumstances obtaining in the above authoritative decision of the Court of Appeal, apply *mutatis mutandis* in the appeal under consideration. The appellant was 18 years of age at the time of

committing the offence. Upon conviction, he was sentenced to life imprisonment. In terms of the position of the law as it stands, the sentence imposed on the appellant was excessive. He was sentenced to more than he deserved since the trial magistrate was limited to sentence him to corporal punishment. I therefore find merits in the 1st ground of appeal.

In the 2nd ground, the appellant faulted the trial magistrate for recording the evidence of PW1 in contravention of **Section 127(2) of the TEA**. For easy of reference, **Section 127(2) of TEA** which governs the manner of receiving evidence of a witness of tender age provides:

> *"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 lies.*** "(Emphasis added)"

The procedure of receiving evidence of a child of tender age was restated in *extenso*, in the case of **Geoffrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported). In that case the Court stated that where a witness is a child of tender age, a trial court should at the foremost, ask 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 child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies. The Court of Appeal expounded:

> *"We think, **the trial magistrate or judge can ask the witness of a 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 which the child professes and whether he/she understands the nature of oath.*
> *3. Whether or not the child promises to tell the truth and not to tell lies."* (Emphasis added).

It is trite to note that a child of tender age may either give evidence on oath/affirmation or without oath/affirmation, but such witness must make a promise to the court that he/she will tell the truth and not lies. That is the import of **Section 127(2) of TEA**. To be in a better position to resolve whether the evidence of PW1 was received in compliance with the law, it is instructive to reproduce what transpired in the trial court prior to receiving PW1's evidence. It thus goes:

> *"**PROSECUTION CASE OPENS**:*
> *PW1 Is KWL, 8, Resident of Maili Sita, Ngaramtoni, Maasai, Christian, a pupil of STD III.*
> ***COURT**: The child is asked if he knows the meaning of oath or whether he know the meaning of truth. After the inquiry*

the court decided to know if the child knows the meaning of truth. ***The court realized the child do not know the meaning of oath but he knows about speaking the truth and he promised to speak the truth.***

Sgd: I. T. Nguvava-SRM

08/12/2022

PW1: ***I promise to speak the truth.***"(Emphasis added)

From the above prescripts, it is apparent to note that the trial magistrate conducted inquiry and at the end he remarked that PW1 did not know the meaning of oath, but he promised to speak the truth. There is no substance of the inquiry conducted by the trial magistrate to ascertain whether the appellant knew the meaning of oath or whether he promised to tell the truth and not lies. The questions put to the victim to test whether he knew the meaning and nature of oath before giving his evidence on the promise to tell the court the truth and not lies are not reflected in the trial court record. In the case of **Hassan Yusuph v. Republic**, Criminal Appeal No. 462 of 2019 (unreported), it was held:

"As it was in ***Issa Salum Nambaluka*** *(supra), the record in this appeal is silent as to how the trial court reached to a conclusion that PW1 possessed sufficient intelligence to justify the reception of her evidence upon affirmation. Since the record is silent, we find that the recording of PW1's*

evidence was in contravention of the provisions of section 127 (2) of the Evidence Act."

In that case just like the appeal under scrutiny, the trial court record is silent on how it reached a conclusion that PW1 did not understand the nature and meaning of oath and that he promised to tell the truth. The questions leading to the court's findings ought to have been reflected in the proceedings. The procedural flaw entails that PW1's evidence was received in contravention of **Section 127(2) of TEA**.

Notwithstanding the above infraction, still the promise which was made by the victim himself was not complete. **Section 127(2)** requires that the promise should be in telling the truth and not lies. In the trial court as reflected in the proceedings, PW1 promised to speak the truth only. In the case of **John Mkorongo James v. Republic** (supra), it was held:

"We have also observed that besides the omission or failure by the trial court to have first examined PW1 to test his competence and know if he understood the meaning and nature of an oath before jumping to the conclusion that PW1 would give unsworn evidence on the promise to the court to tell the truth, PW1's promise was incomplete and it was in form of an indirect or reported speech instead of a direct speech. It was incomplete because while section 127

(2) of the Evidence Act, ***require that the promise should be in telling the truth and not telling any lies, what PW1 is said to have promised is only to tell the truth. He did not promise not to tell any lies.*** *It is recommended that the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete."*(Emphasis added).

As pointed out earlier, since PW1's evidence was received in contravention of **Section 127(2) of TEA**, such evidence is liable to be discarded, as I hereby do.

Having discarded the evidence of PW1 from the court record, next for consideration is whether the remaining evidence is sufficient to warrant and sustain the appellant's conviction. Having discarded the evidence of PW1, the remaining evidence such as that of the victim's father (PW3), the doctor who examined the victim (PW2) and the investigative police officer (PW4) remain to be mere hearsay, because none of them witnessed when the offence was committed. The Court of Appeal in plethora of its authorities such as **Masoud Mgosi v. The Republic**, Criminal Appeal No. 195 of 2018, **Masanja Makunga v. The Republic**, Criminal Appeal No. 378 of 2018 (both unreported) and **Hassan Yusuph Ally** (supra), found that after discounting the evidence of the victim, there was no other evidence to warrant the appellant's

conviction on the account that the rest of the witnesses' evidence remained hearsay. I take similar position.

Having found merits in the first and second grounds of appeal, I do not find compelling reasons to delve on determining the rest of the grounds of appeal since that will not serve any useful purpose. The 1st and 2nd grounds of appeal sufficiently dispose of the entire appeal. The evidence available is insufficient to sustain the appellant's conviction. The case against the appellant therefore remained unproved to the hilt due to the pointed-out flaws.

In sum the appeal has merits. Consequently, I allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant by the trial court. It is ordered that the appellant be released from prison immediately, unless he is otherwise lawfully held.

Order accordingly,

DATED at **ARUSHA** this 28th March 2024

N. R. MWASEBA

JUDGE