IN THE HIGH COURT OF TANZANIA

AT MOSHI

DC CRIMINAL APPEAL NO. 10314 OF 2023

(Originating from Criminal Case No. 179 of 2023, Moshi District Court)

DANIEL S/O ANAELI DANIEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

8th to 14th May, 2024

E.B. LUVANDA, J

The Appellant named above was indicted for unnatural offence contrary to the provisions of section 154(1)(a) and (2) of the Penal Code Cap 6 R.E. 2022. At the end of the day, the trial court made a finding that the evidence tendered by the prosecution, citing PW1 (the victim), was sufficient to mount conviction, also a PF3 exhibit P1 (sic, P2) proved penetration. Hence held the Appellant guilty for unnatural offence and eventually convicted him.

In the petition of appeal, the Appellant grounded that: One, the trial court grossly erred in law and fact by convicting and sentencing the Appellant to life imprisonment basing on the judgment which is not conformity with the law; Two, the trial court erred in law and fact by convicting and sentencing

the Appellant despite the charge being not proved on the weight and standard required by the law; Three, the trial court grossly erred in law and fact when convicted the Appellant by disregarding his defence; Four, the trial court erred in law and fact by convicting and sentencing the Appellant to life imprisonment basing on PF3 (exhibit P2) which did not establish penetration into the victim's anus.

Arguing the first ground of appeal, Ms. Christina Kawanara and Mr. Tasiel Kikoti learned advocates for the Appellant submitted that the Appellant was convicted under a wrong provision of the law. They submitted that for a judgment to be proper, must contain conviction and sentence. They submitted that a judgment of the subordinate court lacks these ingredients, citing page 17 last paragraph of the impugned judgment. They submitted that the provision mentioned to wit section 235(1) of the Criminal Procedure Act, Cap 20 R.E. 2022, is all about procedures of convicting the accused person, argued it is not a provision for convicting the accused person. They submitted that failure to convict the Appellant using the required law, render the judgment to be against the law. They submitted that the judgment does not mention a proper sentence. They cited the case of **Anyikisye Mwambisa @ Mwanakula vs. DPP,** Criminal Appeal 55/2019, HC Mbeya,

at page 3 last paragraph, for a proposition that it commented on section 235 (1) Cap 20 (supra). They submitted that the trial magistrate cited section 235(1) CPA, which is not a provision for conviction, arguing that the judgment is not proper, for it contravene the requirement of law. The learned Counsel submitted that the wording used by the magistrate, does not mention conviction and a sentence to be served, argued it contravene section 312 (1) and (2) Cap 20 (supra). They submitted the view that, so far the judgment contravene the law, argued the Court to allow the appeal and discharge the Appellant.

In reply to ground number one, Mr. John Mgave learned State Attorney technically supported this ground. He submitted that the judgment ended at a conviction, citing page 17 of the impugned judgment. He submitted that the trial magistrate convicted u/s 154(1)(a) of Cap 16 (supra), arguing that the trial court was correct to say the Appellant is guilty u/s 154(1)(a) Cap 16 (supa), for reason that the Appellant was charged for unnatural offence c/s 154(1)(a) and (2) Cap 16 (supra). It was the view of the learned State Attorney that so far the charge was read aloud to the Appellant, argued it is obvious that he was aware of the offence stand charged. He submitted that failure to include subsection (2) of section 154 Cap 16 (supra), is not fatal.

He submitted that everyone is presumed to know the law, as such the Appellant after being convicted, was punished in terms of the sentence prescribed in the offence as per the charge sheet. The learned State Attorney, conceded a fact that the judgment does not show the sentencing part. However, he argued that the omission does not render the judgment meaningless, rather argued under section 388 Cap 20 (supra), the Appellate Court can order the subordinate court to comply. It was the view of the learned State Attorney that this Court should order retrial to the extent of sentencing for the trial court to sentence the Appellant.

On rejoinder, the learned Counsel for the Appellant submitted that according to section 312(2) Cap 20 (supra), provide on how the judgment ought to be crafted, argued it presupposes the judgment to specify the offence. They submitted that it was a duty of the trial court to specify the offence and pronounce sentence which was not complied with, citing **Hussein Idd Msuya vs. R. Cr Appeal No. 10/2021, HC,** at page 8 last paragraph. They submitted that, in view of other grounds on their submission, they were of opinion that even if this case is returned to the subordinate court it was not proved beyond reasonable ground.

What I have grasped from the arguments above, there are three complaints featuring in ground number one: First, the Appellant was convicted under a wrong provision of the law, faulting the trial magistrate for citing or mentioning section 235(1) of Cap 20 (supra) as the provision under which the Appellant was convicted; Secondly, the provision of section 154(1)(a) Cap 16 (supra) was incomplete citation, arguing subsection (2) was omitted; Thirdly a sentencing part is missing.

I will start tackling a complaint regarding citation of section 235(1) of Cap 20 (supra) appearing at a final verdict of the impugned judgment. The said provision provide,

> *"The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code"*

Therefore, on my perspective point of view, I am not seeing any serious irregularity or mischief on merely citing this provision. In fact, citation of this provision does not render the entire judgment invalid. The learned Senior Resident Magistrate having indicated that the Appellant was guilty under the provision of section 154(1)(a) of Cap 16 (supra), citing section 235(1) after

convicting the Appellant, to my view was a mere cosmetic which does not add any value or invalidate anything. This is because the Appellant was properly pronounced to have been found guilty. Indeed, the learned Senior Resident Magistrate was smart, for reason that she avoided making a verdict suggesting that the Appellant was convicted under the said section 235(1) of Cap 20 (supra), rather the wording used is that the Appellant was convicted as per and not under section 235(1) Cap 20 (supra). In the premises, the argument of the learned Counsel for the Appellant to the effects that the said provision is all about procedures of convicting the accused person and not a provision for convicting the accused person, support what was done by the trial magistrate. Meaning that the trial court was still not at foul, for the aforesaid reason that the trial court avoided to pronounce that it was convicting the Appellant under that provision. To be precise the learned Resident Magistrate citated it as a procedural provision and not as a substantive provision under which the Appellant was convicted. Therefore, I am not seeing any immediate serious or grave mistake for citing the provision of section 235(1) Cap 20 (supra), as a procedural provision under which the verdict was derived from or imitating compliance to it.

Number two, is a concern that the provision of section 154(1) (a) Cap 16 (supra) was cited in piecemeal, omitted subsection (2). It is true that in the charge sheet the drawer cited the complete provision of section 154(1)(a) and (2) of Cap 16 (supra). But at the verdict of guilty, the learned Senior Resident Magistrate partially cited subsection (1)(a) of section 154 and omitted subsection (2) of section 154. To my view, the learned Senior Resident Magistrate is faulted for nothing. It is elementary that the said two subsection saves two distinct purpose and objectives. Subsection (1)(a) create an offence, while subsection (2) provide penal measure for that offence. Therefore, the learned Senior Resident Magistrate was quietly correct to cite subsection (1)(a) of section 154 in exclusion of subsection (2) of section 154 at a verdict of guilty, for obvious reason that it was a conviction part and not a sentencing zone. To my understanding conviction and sentencing part are two separate and different process or procedure. Each part is substantive and is not interwoven to each other.

For brevity, I reproduce the provision of section 154(1)(a) and (2) of Cap 16 (supra),

(1) Any person who–

(a) has carnal knowledge of any person against the

order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature,

commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) Where the offence under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment.

Therefore, the provisions of subsection (2) come into play when determining the appropriate sentence to be imposed to the offender.

Number three, a concern that a sentencing part is missing. There is merit on this complaint. Going by the entire records of the trial court proceedings, a sentencing part is wholly missing does not feature anywhere, be it on a handwritten proceedings, typed proceedings, the impugned judgment itself, nor anywhere in the court file is nowhere to be located. The only document which is available in the court file is a warrant of committing the offender to imprisonment (photocopy version) showing the Appellant was convicted before N.E. Mwerinde, Magistrate and sentenced to life imprisonment. The said N.E. Mwerinde does not feature anywhere in the records of the trial

court proceedings. According to the records of the trial court, the presiding (trial) magistrate who also crafted the judgment is Honorable R.G. Olambo, Senior Resident Magistrate. The alleged N.E. Mwerindo, Magistrate is a stranger to the proceedings. It might be this misnomer was attributed or occasioned by the fact that there is no records indicating that a judgment was delivered or pronounced to parties.

According to the provision of section 311 Cap 20 (supra) which is applicable to both subordinate court and high court, provide,

> *"(1) The judgment in every trial in any criminal court shall be pronounced in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties and their advocates, if any, but where the judgment is in writing at the time of pronouncement, the judge or magistrate may, unless objection to that course is taken by either the prosecution or the defence, explain the substance of the judgment in open court in lieu of reading such judgment in full.*
>
> *(2) The accused person shall, if in custody, be brought up or, if not in custody, be required by the court to attend to hear judgment delivered except where his personal attendance during the trial has been dispersed with and the sentence is one of fine only or he is acquitted.*

(3) Subject to subsection (2), where there is more than one accused person, and one or more of them does not attend the court on the date on which the judgment is to be delivered, the judge or magistrate may, in order to avoid undue delay in the disposal of the case, deliver the judgment notwithstanding his or their absence.

(4) No judgment delivered by any court shall be deemed to be invalid by reason only of the absence of any party or his advocate on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their advocates, or any of them, the notice of such day and place.

(5) Nothing in this section shall be construed as to limit in any way the provisions of section 299"

As stated above, the sentencing part is missing completely. That is to say the learned Senior Resident Magistrate upon convicting the Appellant did not invite the Prosecution to address on aggravating factor neither invited the Appellant or his Counsel to address on mitigation. Presumably it was taken for granted that the penal statute prescribes for a life imprisonment sentence. However, the general rule for subordinate courts, before passing sentence must accord parties to address as per the above manner and order.

This is in terms of the provision of section 236 Cap 20 (supra) with marginal notes, evidence relating to proper sentence or order, I quote,

> *"The court may, before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed"*

Therefore, it was imperative for the trial court to accord parties to address it regarding aggravating and mitigating factors, as an integral component of sentencing. Unfortunate everything is missing. To my view the omission to indicate that the judgment was pronounced to parties including a sentencing part, is serios irregularity which is incurable.

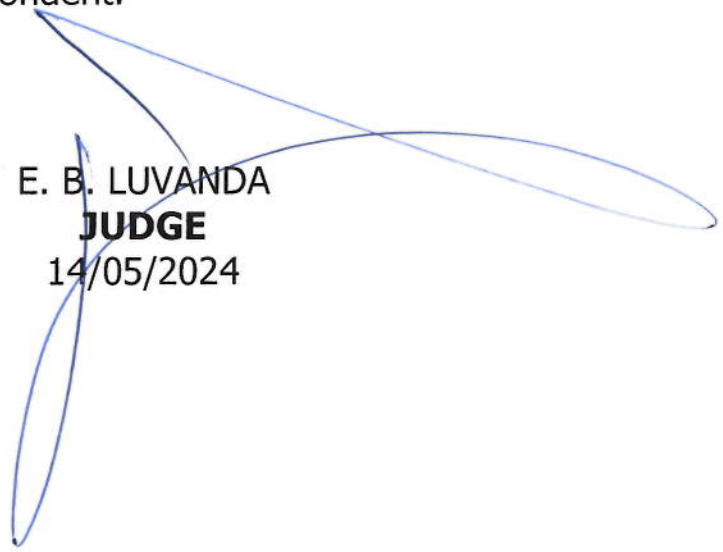
As much this ground dispose this appeal, I will not dwell on adjudicating other grounds of appeal.

I therefore nullify a warrant of commitment on a sentence of imprisonment (photocopy) where the Appellant was sentenced to life imprisonment, the same is set aside. The trial court is directed to formerly deliver and pronounce the judgment to parties, then embark on the procedure of sentencing, pass sentence and make orders if any. Meanwhile the Appellant shall remain under custody.

The appeal is partly allowed to the extent demonstrated above.

E.B. LUVANDA
JUDGE
14/05/2024

Judgment delivered in the presence of the Appellant and Mr. John Mgave learned State Attorney the Respondent.



E. B. LUVANDA
JUDGE
14/05/2024