IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 4467 OF 2024

(Arising from Criminal Case No. 29 of 2023 in the District Court of Kibaha)

BETWEEN

FANUEL HAMZA..... APPELLANT

AND

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 14/06/2024

Date of Judgment: 20/06/2024

A.A. MBAGWA J.

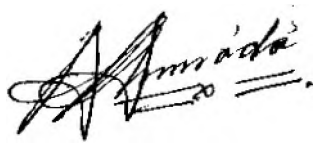
This is an appeal against the conviction and sentence meted out by the District Court of Kibaha (Hon. F. Kibona RM). The appellant was charged and subsequently convicted of an unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code. He was consequently sentenced to life imprisonment. Aggrieved with both conviction and sentence, the appellant knocked on the doors of this Court with a petition of appeal containing six grounds of appeal as follows;

1. That, the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant without complying with the provisions of sections 113 and 119 of the law of the Child Act, Cap. 13 R.E 2019 and section 131 (2) (a) of the penal code, (Cap. 16 R.E 2022) the omission which renders both the conviction and sentence unsafe and/or manifest excessive against the appellant.

2. That, the learned trial Magistrate erred in law and fact in Convicting the appellant without drawing an inference adverse to the prosecution for the failure to parade the said ten-cell leader to testify in Court and prove the facts in issue.

3. That, the learned trial Magistrate erred in law and fact in Convicting the appellant based on the evidence of Pw2 (victim) and Pw3 whose testimony was improbable, incredible, untruthful, and unreliable to warrant the appellant's Conviction as charged. 4. That, the learned trial Magistrate erred in law and fact in Convicting the appellant without making a sufficient evaluation, analysis, determination, and Consideration of the defence evidence the omission which resulted in a serious misdirection amounting to a miscarriage of justice and Constituted a mistrial.

5. That, the learned trial Magistrate erred in law and fact in Convicting the appellant when the prosecution did not prove its charge against the appellant beyond all reasonable doubts as required by law.



Briefly, the factual background leading to the present appeal may be narrated as follows; It was alleged in the particulars of offence that the appellant on diverse dates within February 2023 at Simbani area within Kibaha District in Coast Region did have carnal knowledge of a nine (9) year-boy namely, CN against the order of nature. Upon arraignment, the appellant denied the accusations hence the prosecution was compelled to call witnesses to prove the case.

In a bid to discharge its duty, the prosecution paraded six witnesses to wit, Rehema Muhamed (PW1), the victim (CN) PW2, Elisha Erasto (PW3), WP Sergent Mwanakombo (PW4), Lawrence Katela (PW5) and Gerald Kifuma (PW6). Besides, the prosecution tendered one documentary exhibit namely, a PF3, and the same was admitted and marked exhibit P1.

It was the prosecution's assertion that sometime in February 2023 while on their way from school to home, at Shamba Pori area, the appellant apprehended the victim and his fellows namely, Areni and Elisha. Shortly thereafter, the appellant released the two while continuing to hold the victim (PW2). The appellant dragged the victim into the semifinished house, undressed and sodomised him. He then let the victim go home. According to the victim's evidence (PW2), the appellant did this outlawed act for more

than one time. Thus, on the 6th day of March 2023, the victim revealed his ordeal to his mother, Rehema Muhamed (PW1). Rehema examined the victim's anus and observed faeces. She thus reported the incident to Kibaha Police Station where a PF3 was issued. PW1 submitted the victim to Tumbi Regional Hospital. It was the evidence of Mr. Gerald Kifuma (PW6), the medical doctor who examined the victim that, upon examination, he found fungus in the victim's anus. PW6 also told the trial court that the victim's anus was open thereby suggesting that he had been penetrated. PW6 tendered a PF3 which contained his medical findings and the same was admitted as exhibit P1.

Following the revelation of the incident, a hunt for the appellant was mounted. It was the evidence of Lawrence Katela (PW5) that Areni and Elisha who were with the victim on a fateful day identified the assailant. PW5 stated that the appellant was living in the same area to wit, Simbani. Thus, the appellant was arrested and surrendered to the police station.

The victim's evidence on his apprehension by the appellant was supported by his fellow pupil who was with him on the material day. Elisha Erasto (PW3), a boy aged nine years, having promised to tell the truth, told the court that one day he, the victim, and Areni, while coming from school, they

were hijacked by the appellant but shortly after he released them but continued to hold the victim.

In defence, the appellant disputed the allegations. He, however, admitted that the victim and Elisha identified him when they were asked by their parents before his arrest.

Upon conclusion of the hearing, the trial Magistrate was satisfied that the prosecution case was proved to the hilt. Consequently, the appellant was convicted and sentenced to life imprisonment.

When the appeal was called on for the hearing, the appellant fended for himself whilst the respondent Republic was represented by Ms. Neema Kwayu, the learned State Attorney. The appellant prayed to dispose of the appeal by way of written submissions. The prayer was granted without objection. Both sides duly filed their respective submissions.

As hinted above, the appellant raised five grounds of appeal, however, in his submissions he argued the 1st ground separately but the 2nd up to 5th grounds were combined and argued conjointly.

Submitting in support of the 1st ground of appeal, the appellant had it that the appellant was below 18 years at the time of the commission of an offence

but the trial Court did not inquire into the appellant's age contrary to the dictates of section 113 and 119 of the law of the Child Act, Cap. 13 R.E 2019 and section 131 (2) (a) of the Penal Code. According to the appellant, the omission was fatal as it led the trial Court to impose an illegal sentence. While citing the cases of **Jumanne Mzanje vs the Republic,** Criminal Appeal No. 601 of 2021, CAT at Dodoma and **Ramadhani Mangobele vs the Republic,** Criminal Appeal No. 76 of 2010, CAT at Dar es Salaam, the appellant forcefully submitted that the trial Magistrate ought to sentence him according to section 131(2) of the Penal Code. He opined that since he was below 18 years old, the trial court ought to impose on him the corporal punishment. In rebuttal, Ms. Kwayu countered the appellant's complaint saying that it was an afterthought. Ms. Kwayu submitted that the appellant admitted, during a preliminary hearing, his age to be 18 years. He said that the appellant raised the issue of age during his defence and upon cross-examination, he told the court that he had no proof of his age. To fathom his position, the learned State Attorney referred this court to the case of **Issa Hassan Uki vs the Republic,** Criminal Appeal No. 129 of 2017, CAT at Mtwara where it was held that a person is estopped from denying a fact which he already admitted.

I have carefully considered the appellant's grievance and the rival submissions. I have also scanned the lower court record. According to the record, it is clear that during the preliminary hearing, the appellant admitted his personal particulars including the fact that he was 18 years old. However, in his defence, the appellant stated to be 17 years old. Surprisingly, the appellant attached to the petition of appeal his birth certificate purporting to be issued on 23rd August 2023 that is after the appellant was convicted. According to the said birth certificate, the appellant, Fanuel Hamza Kinyota was born on the 26th day of July 2006.

As rightly submitted by the learned State Attorney, the appellant admitted the age of 18 years during the preliminary hearing. As such, the prosecution cannot be blamed for not adducing further evidence to prove the appellant's age nor did the appellant attempt to challenge it even during cross-examination. He came to allege the age of 17 during defence. To crown it all, the appellant attached a copy of the birth certificate No. 3164564A to the petition of appeal. The appellant did not even ask the court to tender the birth certificate as additional evidence under section 369 of the Criminal Procedure Act. As such, the alleged birth certificate, in law, is not properly in the record before this Court. Nonetheless, it is common cause that owing

to the nature of the offence of which the appellant was convicted and taking into account the requirements of section 119 of the Law of the Child Act, ascertainment of the appellant's age, in the circumstances of this case, is of great essence as far as termination of the appellant's fate is concerned. I have also taken into account that the appellant, right from the trial court, did not have legal representation as such, some procedural errors might have occurred due to ignorance.

In view of the above, it is my considered opinion that, in the interest of justice, the appellant should be given a second chance to be heard about his true age. Thus, I remit the case file to the trial court in terms of section 369 (1) of the Criminal Procedure Act and direct the trial District Court of Kibaha to take additional evidence of birth certificate and thereafter certify the same to this Court. I believe this option will meet the ends of justice as it affords both parties the opportunity for a fair hearing. The appellant will tender the original copy and the prosecution will have time to cross-examine.

That said and done, I hereby remit the case file to the trial District Court of Kibaha to comply with the directives. In the meantime, the appellant shall remain in custody.

It is so ordered.

The right of appeal is explained.

A.A. Mbagwa

JUDGE

20/06/2024