IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI SUB-REGISTRY
AT MOSHI

CRIMINAL APPEAL NO. 5054 OF 2024

(Appeal from the Judgment of the District Court of Moshi at Moshi dated 19th October, 2022 in Criminal case No. 348/2021)

JAPHET JOSEPH LOATA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25th June & 2nd July, 2024.

A.P. KILIMI, J.:

It was in the District Court of Moshi at Moshi, wherein the appellant named above was charged with the offence of unnatural offence contrary to section 154(1)(a)(2) of the Penal Code Cap 16 R.E 2019 'Penal Code'. Thereat it was alleged by the Prosecution that on 8th Day of October 2021 at Newland area within Moshi District Kilimanjaro region, appellant did have carnal knowledge of the victim aged 3 years old against the order of nature. Victim shall be referred as the victim or PW2 to conceal her true identity. The appellant pleaded not guilty to the charge and the case proceeded into a full trial and thereafter appellant was found guilty, convicted and sentenced to serve 30 years imprisonment.

In order to appreciate the context in which the above conviction arose I find it apposite to briefly state that, it was on 6/10/2021 PW1 a grandmother of the victim (PW2) was inside the house and heard PW2 crying outside. She rushed outside and saw the accused person who was grazing cattle and goat. Upon questioning the victim why he was crying, PW2 told her that the accused had inserted his manhood into his buttocks. PW1 decided to undress PW2 and saw he had a stain of blood and stool to his anus. Her evidence was supported by PW3 the victim's mother who stated that upon hearing her son crying she also went outside where her son pointed the accused to be the one who sodomized him. PW3 testified to have seen her son with stool in his anus and some fluids upon inspecting him. The victim himself PW2 stated that he was afraid of the accused and that it was the other Maasai who hurt him. The matter was reported to a village chairman (PW5) where the accused was arrested and the victim was taken to hospital.

PW4 a police officer testified that the accused admitted to have committed the offence and that she wrote a caution statement 'exhibit P1' of the accused confessing to have committed the offence. The Medical doctor (PW6) examined the victim and found bruises in victim's anus that were caused by a blunt object. PW6 tendered the PF3 which were admitted as 'exhibit P2'.

The accused denied the allegations and stated that on 29/09/2021 he was at his work place at Mtakuja where the police officers appeared and arrested him and took him to a lockup in Police central station and on 08/10/2021 he was taken into a room and was forced to sign some papers.

Upon such evidence, the trial Court evaluated the evidence of both parties and decided that the case was proved beyond reasonable doubts, hence found the appellant guilty and proceeded to convict him and sentenced as alluded above.

Undeterred, the appellant preferred the present appeal. In the memorandum of appeal, he has raised five grounds of complaint which can be conveniently paraphrased as follows; **one;** that, the trial Court erred in law by sentencing the appellant in contravention of section 160 B of the Penal Code, Cap 16 R.E 2019. **Two;** that, the trial Magistrate erred both in law and fact in relying upon the evidence of the victim which was taken contrary to section 127 (2) of the Evidence Act, Cap 6 R.E 2019. **Three;** that, the trial Magistrate erred both in law and fact in finding and holding that, the Appellant ravished the victim while PW2 himself denied to have had been ravished by the appellant, and did not know him. **Four;** that, the trial Magistrate erred in law in relying upon the cautioned statement (Exh.P1) which was unprocedural and illegally acquired tendered and admitted in evidence as exhibit. And **five;** that, the trial Magistrate

grossly erred both in law and fact in convicting the appellant while the prosecution did not prove the charge beyond reasonable doubt.

In support of his appeal, the appellant who fended himself unrepresented, in his written submission in regard to the first ground he submitted that he was a 17years of age when he was convicted by the trial Court thus the trial Magistrate erred in imposing such a harsh and severe sentence of thirty (30) years contrary to section 160B of the Penal Code. To support his contention, he invited this court to a decision of the court in **Zuberi Mohamed @Mkapa vs. The Republic**, Criminal Appeal No. 563 of 2020 at page 19.

In regard to ground number two that the evidence was taken contrary to section 127(2) of the Evidence Act, the appellant submitted that the victim was of a tender age and the trial court failed to put him through some simplified questions to ascertain whether the child was in understanding of the nature and meaning of oath.

As for ground number three, the appellant submitted that PW2 failed to identify the accused as evidenced in page 11 and 12 of the trial court proceedings where PW2 testimony was that he did not know the appellant.

Submitting on ground number four, the appellant stated that the trial Court erred in admitting the caution statement as the same was contested by the appellant during trial and was not cleared before being admitted as an exhibit. He submitted that the court ought to clear the objection before admitting the

said exhibit. To cement his point, he referred to a decision of this court in **Arobogast Augustino @Shayo and Two others Vs. Republic**, Consolidated Criminal Appeal No. 24 and 40 of 2022 at page 18.

In respect to requirement of prove beyond reasonable doubt by the prosecution, the appellant contended that the trial Court used weak evidence which was full of discrepancies and contradiction. He submitted that PW2 when appeared before the court mixed the names to be Gabriel while in his testimony, he claimed to be Collin Gabriel Lyimo while PW6 a Medical officer testified to have examined the victim with a name Gabriel Adrian Lyimo. The appellant further argued that one cannot ascertain if they were the same name, to bolster his point on names difference, the appellant referred to a decision of **Victor Goodluck Munuo vs. Republic**, Criminal Appeal No. 357 of 2019 at page 7. The appellant concluded that the case against him was not proved to the required standards and prayed his appeal be allowed

In reply Mr. Wambura learned state Attorney who represented the Republic supported this appeal and prayed the appellant be released from prison and her appeal be allowed. The learned State Attorney opted to reply only to the first ground of appeal and submitted that it was true that the trial court grossly erred in convicting the appellant contrary to section 160B of the Penal Code. Mr. Wambura argued that the appellant at a trial court was never cross

examined by the prosecution in regards to his age after he testified to be of 17 years as per the trial Court proceedings at page 24 and 25.

Mr. Wambura then submitted that such failure to cross examine a witness in certain important issue like that is usually taken as the truth of the witness. The learned state attorney supported his point by referring to the decisions of **Amos Jackson vs. Republic,** Criminal Appeal No 439 of 2018 CAT shinyanga at page 8, also the decision **Nyerere Damian Ruhele vs. Republic,** Criminal Appeal No 501 of 2007 CAT. Thus, he was of the view that the trial court erred in sentencing the accused to thirty (30) years in prison without regarding his age contrary to the law. The learned state attorney prayed for the appeal to be allowed and the accused be released from prison as he was already served for almost one year and 8 months.

One issue which appear appropriate for determination in this appeal is whether the appeal before me has merits; Conveniently, I wish to start with second and third ground of appeal.

I had time to go through the trial court proceedings to ascertain whether the trial court failed to follow the procedure of inquiry as argued by the appellant. It is trite law that a child of a tender age when promises to tell the truth, then his testimony may be taken with or without an oath. According to the record, trial court after inquiring about the names of the victim, it proceeded to record that PW2 promised to tell the truth. The trial court did not reveal the

questions posed to PW2 in ascertaining whether he promised to tell the truth but in my view since the court recorded that PW2 promised to tell the truth, it suffices to prove that prior to that the trial court observed and was satisfied that the victim was in a position and had promised to tell the truth, thus ground number two fails.

In regard to ground number three, I have gone through the proceedings to ascertain whether the victim failed to identify and name the accused/appellant. The victim PW2 in his testimony failed to name the appellant as the one who sodomized him, rather he stated that the other Maasai was the one who did bad thing to him. The trial court recorded that the victim then proceeded to cry out loudly that he was scared of the the appellant. In my view such testimony falls short, such testimony do not directly name the appellant to be the one who sodomized the victim. (See **Seleman Makumba vs. Republic** [2006] T.L.R 376). In that regard this ground has merit in favour of the appellant.

As to ground number 4 that the caution statement was illegally admitted, I have perused the trial court records and at page 15 and 16 of the trial court proceedings, the accused stated that he did not know how to write and read after he was asked if he objected the caution statement to be admitted, the trial court proceeded to admit the said caution statement and it was read out loud by PW4. For ease reference on what transpires I reproduce the same hereunder;

> *"**Accused**: I don't know to read and write. I signed with my thumb finger.*
>
> ***Court**: caution statement of accused admitted and marked as exhibit 'P1'...*
>
> ***Court**: Caution statement read aloud in presence of accused."*

From the extract above, the trial court after asking the appellant if he was objecting the caution statement, he replied that he did not know how to read and write but he signed the said statement with his thumb finger. Such evidence neither reveal that he objected the said statement to be admitted as exhibit nor he object its voluntariness. Thus, in my view the caution statement before being admitted as exhibit was cleared and was properly admitted by the trial court, thus ground number four also fails forthwith.

In respect to whether the case against the appellant was proved beyond reasonable doubts. It is trite law that in criminal cases, the duty to prove beyond reasonable doubt always lies on the prosecution. See Section 3(2) (a)of the Evidence Act [Cap 6 R.E 2019] and the decisions of **Christian s/o Kaale and Rwekiza s/o Bernard vs. Republic**, [1992] TLR 302, **Jonas Nkize vs. Republic** [1992] TZHC 22.

Furthermore, the accused is only obliged to raise doubts against the prosecution evidence. The decision of **Bathromeo Vicent vs. Director of**

Public Prosecution (Criminal Appeal No 521 of 2019) [2024] TZCA 186 at page 10 and 11 the CAT stated that;

> *It is well settled that in Criminal trials,* ***the duty of the accused is to raise doubts on the prosecution case****. In the circumstances of this case, we are convinced that the defence case put holes in the prosecution case against the appellant"*
>
> [Emphasis is mine].

I have gone thoroughly through the records and evidence adduced by witnesses at a trial court and as correctly submitted by the appellant; I am settled the case against the appellant at a trial Court was not proved beyond reasonable doubts. I reserve my reasons which now I give. First; according to the record, the learned magistrate failed to note that the charge and the testimony of the prosecution witnesses differed with discrepancies on the dates when the crime seems to have been committed. The charge reveals that the crime was committed on 8/10/2022 while PW1 and PW3 testimony is that the crime took place on 06/10/2022. Such difference raises doubts as to when the crime ought to have been committed.

Second, as alluded above, the victim himself failed to identify the appellant to be the one who committed the offence; hence the prosecution

evidence stumbles to a ground since the victim failed to name him as the one who sodomised him but named the other maasai as the one who hurt him. In my considered view these reasons raises doubts to the prosecution side, thus this side cannot remain unshaken see **Bathromeo Vicent** (supra).

Back to ground number one, according to the trial court record at page 24 the appellant said his age is 17 years, also as rightly said by Mr. Wambura in cross examination by prosecuting attorney no inquiry was put in such respect, but also on part of the prosecution the same was not proved otherwise, thus, in that regard I can't hesitated to conclude that since it remains as it is, it is legally resolved in favour of the appellant that what he say is nothing but true. In that regard I am satisfied that the appellant was the age of below 18.

In such regard, the Law of the Child Act Cap 13 RE 2019 together with its rules the Law of the Child (Juvenile Court Procedure) Rules, 2016 provides procedures in sentencing a child. It lists the sentences which are to be imposed to a child when found guilty. And in case the child commits a serious offence, he may be committed to an approved school.

Therefore, the trial court misdirected itself in sentencing the appellant to thirty years imprisonment as the appellant ought to be dealt in accordance with the law of the Child Act (supra). This court further is vested with discretionary and revisionary powers in protecting the rights of the child in case there is a cruel excessive punishment or sentence imposed on a child as provided for

under section 160B of the Penal code (supra) which provides punishment for children. The said provision provides that;

> *"For promotion and protection of the right of the child, nothing in chapter XV of this Code shall prevent the court from exercising*
> *(a) revisionary powers to satisfy that, cruel sentences are not imposed to person 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."*

So, since the appeal at hand the appellant was below the age of majority during the commission of a crime as he was 17 years as per the trial court proceedings alluded above, it is my settled view the sentence imposed by the trial court of sentencing the appellant to 30 years in prison while he was below the age of eighteen (18) years was flawed. In the premise therefore, this ground is meritorious hence sustained.

For the foregoing stated, cumulatively, I find and hold that the appeal is meritorious and I allow it. Consequently, I order that the conviction entered and the sentence passed against the appellant by the trial Court is hereby quashed and set aside. I also order that the appellant be immediately released from prison unless he is held for other lawful reasons.

It is so ordered.

DATED at **MOSHI** this 2nd day of July, 2024.

A. P. KILIMI
JUDGE

Court: Judgment delivered today on 2nd day of July, 2024 in the presence Mr. Frenk Daudi Wambura, learned State Attorney for respondent. Appellant present in person.

Sgd: A. P. KILIMI
JUDGE
2/07/2024

Court: Right of Appeal duly explained.

Sgd: A. P. KILIMI
JUDGE
2/07/2024