IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 41 OF 2023

(C/F Criminal Case No. 260 of 2022 in the District Court of Moshi at Moshi)

ANTHONY EDSON MLAY…….…… APPELLANT

VERSUS

THE REPUBLIC……. RESPONDENT

JUDGEMENT

Date of Last Order: 12.02.2024
Date of Judgment: 18.03.2024

MONGELLA, J.

The appellant herein was arraigned in the District Court of Same at Same (hereinafter, the trial court) for unnatural offence contrary to **section 154 (1), (a) and (2) of the Penal Code** [Cap 16 R.E 2022]. The particulars of the offence were that: on 04.06.2022 at Msae kinyamvua area within Moshi district and Kilimanjaro region, the appellant had carnal knowledge of an 8 years old boy (hereinafter, the victim or PW1) against order of nature. The appellant denied the charge levelled against him causing the matter to proceed to full trial.

The prosecution paraded four (4) witnesses and one (1) exhibit. The evidence of the prosecution was to the effect that: on the material day, the appellant, who is the uncle of the victim, called the victim.

He as well ordered PW3, his cousin, to vacate. Having remained with the victim, the appellant took him into a room and did "bad habit" to him whereby he inserted his male organ into his anus, an act that caused him pain. After the appellant did so, he warned the victim not to disclose the matter to anyone. The victim later, at night hours, told his grandmother (PW2) about the incident.

It seems the matter was reported first to the local authority and later to the police station whereby a PF3 was issued. The victim went to Kilema hospital with his grandparents and was examined by PW4, a medical doctor who tendered the said PF3. The same was admitted as exhibit P1. The appellant was then arrested and later arraigned before the trial court.

After hearing the prosecution evidence, the trial court found the appellant with a case to answer and invited him to enter his defence. He defended as a sole witness.

His evidence was that: on 03.06.2022 the village alarm was raised. Upon attending the Village Executive Office, he found the village executive officer who informed him of the allegations against him, on having carnal knowledge of the victim against order of nature. That, the victim stated that it was true. The matter was reported to the Police station and he was then arrested.

After considering the evidence of both parties, the trial court found the appellant guilty of the offence charged, convicted and

sentenced him to serve thirty (30) years in prison. Aggrieved, the appellant has preferred this appeal on the following grounds:

1. The learned trial magistrate strayed into error of law when he failed to note that the principles stipulated under section 127 (2) of the Evidence Act, Cap 6 R.E 2019 were violated, as firstly, although it was stated that PW1'S evidence will be received on oath, he was never sworn, secondly, PW1 and PW2 never promised " to tell the truth to the court and not to tell lies"

2. The learned trial magistrate erred in law and factual analysis when he failed to note that the evidence of PW1 does not offer proof of penetration, considering that even the doctor PW4 does not prove if PW1 was sodomised. (sic)

3. The learned trial magistrate strayed into error of law when he failed to note that there was variance of the charge and the evidence adduced as the charge alleges that the incident happened on 4th June 2022, but the evidence adduced does not indicate the alleged date.

4. The learned trial magistrate strayed into error of law when he failed to note that the charge sheet was incurable defective. (sic)

5. The learned trial magistrate erred in law and factual analysis when he failed to consider the defence evidence at all.

6. The learned trial magistrate erred in law and factual analysis when he relied on weak, contradictory with material discrepancies and uncorroborated prosecution evidence.

7. The learned trial magistrate erred in law and factual analysis when he failed to consider the charge against the appellant was not proved beyond reasonable doubt.

The appeal was resolved by written submissions whereby the appellant was unrepresented while the respondent was represented by Mr. Ramadhani A. Kajembe, learned state attorney.

Commencing his submission, the appellant averred that he introduced 3 additional grounds on which he would also submit. Unfortunately, as he did not obtain leave of this court to add the said grounds, this court cannot entertain them. This is because parties and courts are bound by the pleadings and cannot deviate from the same without amendment with leave of the court. See, **Masaka Mussa vs. Rogers Andrew Lumenyela & Others** (Civil Appeal No.497 of 2021) [2023] TZCA 17339; **Barclays Bank T. Ltd vs. Jacob Muro** (Civil Appeal 357 of 2019) [2020] TZCA 1875; **Hood Transport Company Limited vs. East African Development Bank** (Civil Appeal No. 262 of 2019) and **Yara Tanzania Limited vs. Ikuwo General Enterprises Limited** (Civil Appeal 309 of 2019) [2022] TZCA 604 (All from TANZLII).

In **Masaka Mussa vs. Rogers Andrew Lumenyela & Others** (supra) the Court of Appeal held:

> "…it is also our observation that it is not only the parties who are bound by their pleadings but the courts are also bound by the said pleadings of the parties. As it is for the parties to suits, who are not allowed to depart from their pleadings and set up new cases, courts are also bound by the parties' pleadings and they are not allowed to depart from such pleadings and create their own case."

As such, for the additional grounds not being in the petition of appeal which serves as pleading before this court, they cannot be entertained by this court.

On the 1st ground, the appellant alleged that his conviction was wholly based on the evidence of PW1. However, such evidence was taken contrary to the requirement of **section 127 (2) of the Evidence Act** [CAP 6 R.E 2022]. That, the provision as interpreted by the Court of Appeal in its plethora of decisions, provides that a child of tender age may give evidence on oath or affirmation if she or he understands the nature of oath. That, if such child does not understand the nature of oath, then his or her evidence can be received without oath, but she or he must promise to tell the truth and not lies.

He averred further that the method used to determine whether a child understands the nature of oath is for the court to ask a few pertinent questions to the child. He cited the following cases to fortify his argument: **Rashid Said Masumai vs. Republic** (Criminal Appeal No. 162 of 2020) [2023] TZCA 17667; **Faraji Said vs. Republic** (Criminal Appeal 172 of 2018) [2020] TZCA 1755; **Godfrey Wilson vs. Republic** (Criminal Appeal 168 of 2018) [2019] TZCA 109 and; **John Mkorongo James vs. Republic** (Criminal Appeal 498 of 2020) [2022] TZCA 111 (all from TANZLII).

He contended that during trial, the trial magistrate, after putting a few questions to PW1, concluded that he would give evidence on oath. However, he said, there were three irregularities in taking PW1's testimony: **one**, it is unclear as to how the trial magistrate reached the conclusion that PW1 understood the nature of oath and would give evidence on oath. He reasoned that the questions put to PW1 were never geared towards understanding whether he understood the nature of oath. In support of his claim, he made reference to the case of **Godfrey Wilson vs. Republic** (supra) and **Faraji Said vs. Republic** (supra).

Two, that, it is not visible on record that PW1 took an oath prior to giving his testimony nor any indication as to his religion. He found the same being an irregularity for contravening **section 198 (1) of the Criminal Procedure Act** [Cap 20 R.E. 2022].

Three, that, PW1 did not promise to tell the truth and not lies thus, his evidence was unlawful as held in **John Mkorongo vs. Republic** (supra).

The appellant further noted that the trial magistrate also stated in his findings that PW1 had promised to tell the truth while no such promise is seen on record. In that respect, he prayed for the evidence of PW1 to be expunged. The appellant further argued that in expunging PW1's testimony, the surviving evidence by the prosecution cannot sustain his conviction. He had such stance on the ground that PW2 and PW3's evidence was merely hearsay while PW4's evidence did not support the offence. In the same line he challenged the evidence of PW3 in his submission.

Addressing the 3rd ground, he alleged that the evidence adduced did not support the charge in regard to the date the offence took place. He contended that while the charge alleged that the offence was committed on 04.06.2022, there is no evidence led by the prosecution to prove the same. The appellant further challenged the evidence of PW1 and PW3 regarding the date of the incident showing discrepancy between the two. He said that while PW1 never stated the date PW3 vaguely stated that the incident took place in June 2022 without mentioning the specific date.

In addition, he contended that PW3 contradicted himself further by stating that the incident took place on 06.07.2022. Thus, in his view,

there was no evidence that proved the offence took place on 04.06.2022 as stated in the charge. In connection to the unproven date of offence, he contended that he was arrested on 03.06.2022, which was a day before the alleged incidence took place.

The appellant argued that it is settled principle that once a specific date is mentioned in a charge sheet, it is incumbent upon the Republic to lead evidence showing that the offence was committed on the alleged date and the accused person will be in the position to know and prepare his defence in regard to the same.

He argued further that if there is variance between the charge and the evidence on the date the offence was committed, then the prosecution should amend the charge as provided under **section 234(1) of the Criminal Procedure Act**. Otherwise, he said, the charge remains unproved and the accused would be entitled to an acquittal as a matter of right. That, short of that, failure of justice will occur. He fortified his argument with the case of **Abel Masikiti vs. Republic** (Criminal Appeal 24 of 2015) [2015] TZCA 219 TANZLII which was cited in **Faraji Said vs. Republic** (supra).

The appellant further challenged the prosecution for failure to prove the place the offence took place. He claimed that there was uncertainty as to the place the incident occurred rendering the charge unproved. This however, is a new issue as it was not pleaded in his petition of appeal. It shall therefore be disregarded.

With regard to the 6th ground, the appellant presented two arguments: **one**, that there is contradiction between the evidence of witnesses; and **two**, that there was no police investigation and material witnesses were not called. The appellant alleged that there existed contradictions between witnesses. He contended that the evidence in sexual offences must be subjected to careful scrutiny as held in **Athumani Hassan vs. Republic**, Criminal Appeal No. 292 of 2017 (unreported) and **Mohamed Said vs. Republic,** Criminal Appeal No. 145 of 2017 (unreported). He challenged the trial court for failure to exercise careful scrutiny as there are multiple inconsistencies and contradictions that water down the credibility of the prosecution's case. The appellant listed eight (8) contradictions, to wit:

First, that PW2 alleged to have been informed of the incident by PW3 (her grandson), but PW3 stated that he informed his mother; **second**, that PW1 stated that no one was present when the incident took place while PW3 stated that he was present and heard the appellant telling PW1 not to shout or tell anyone, otherwise he would kill him; **third**, that PW2 alleged that the incident happened in June, 2022 while PW3 stated it happened on 06.07.2022; **fourth**, that PW2 and PW3 alleged that the appellant threatened to kill PW1 but PW1 never stated the same; **fifth**, that PW1 and PW2 alleged that PW1 was examined by a doctor who confirmed he was sodomized, but the doctor stated that he did not see any bruises and could not conclude he was sodomized; **sixth**, that since PW1 never stated to have been taken to the police and

only stated to have been taken to the local authorities, there are doubts as to where the PF3 came from; **seventh**, that PW2 alleged that PW1 was sodomized by the appellant three times, but such claim was never supported by any other witnesses not even PW1; and **eighth**, the facts on the preliminary hearing (PH) vary with evidence of PW1, PW2 and PW3. In consideration of the alleged contradictions, the appellant had the stance that the contradictions cast doubts on prosecution's case. He thus prayed for the doubts to be resolved in his favour.

Concerning the 5th ground, the appellant alleged that the trial magistrate misdirected himself for ignoring the defence case. He claimed that no reference to his defence evidence was made prior to the court finding him guilty. He contended that the irregularity vitiates the judgment. Referring to **Article13 (1) and 6(a) of the Constitution of the United Republic of Tanzania, 1997**; the case of **Maiko Charles vs. Republic,** Criminal Appeal No. 20 of 2008 (unreported); **Hussein Ido and Another vs. Republic** [1986] TLR 166; **Abel Masikiti vs. Republic** (supra); and that of **Athumani Hassan vs. Republic** (supra), he contended that the Court of Appeal has emphasized that the defence case must be heard however weak, trivial, foolish or irrelevant it may seem; and that failure to consider the same is denial of fundamental right to be heard.

The appellant further challenged that the trial magistrate failed to examine the evidence of PW4 who medically examined PW1. He contended that PW4 testified during his cross examination to have

found no penetration being occasioned and thus could not conclude that PW1 had been sodomized. In that respect, he had the view that had the Hon. trial Magistrate considered such evidence, he would have reached a conclusion that the appellant was innocent.

In conclusion, the appellant invited this court to find that the case against him was not proved beyond reasonable doubt. He prayed for the appeal to be allowed, the conviction quashed and sentence set aside, and that he be set at liberty.

The appeal was supported by the respondent's counsel. Mr. Kajembe. In reply to the 1st ground, he concurred with the appellant's contention. He acknowledged that the trial court did not comply with the requirement of **section 127 (2) of the Evidence Act**. He submitted that it is trite law that prior to examining a child of tender age, the court must ask the child questions to determine whether he or she understands the nature of oath or if he will promise to speak only the truth. If the child understands the nature of oath, then the court will take his or her oath or affirmation. He fortified his argument with the case of **Amour Hamis Madulu vs. Republic** (Criminal Appeal 322 of 2021) [2023] TZCA 229 TANZLI whereby the case of **Issa Salum Nambaluka vs. Republic** (Criminal Appeal 272 of 2018) [2020] TZCA 10 TANZLII and **Godfrey Wilson** (supra) were cited.

He averred further that it is evident on record of the trial court, that while the trial magistrate assessed whether PW1 knew the meaning of oath or whether he promises to tell the truth, he erred in finding that PW1 knew the nature of oath and promised to tell the truth while it was not shown on record that PW1 did promise to tell the truth. In the premises, he had the view that the questions asked by the trial court did not suggest such answer of understanding the nature of oath. Further that, after stating that PW1 understood the nature of oath, the trial court proceeded recording PW1's testimony without taking his oath. He agreed that **section 198 (1) of the Criminal Procedure Act** and **section 127 of the Evidence Act**, were not complied with rendering the validity of PW1's evidence vitiated. He was of the view that the remedy is to expunge PW1's evidence from proceedings.

As to whether the surviving evidence, if the evidence of PW1 is expunged, could sustain the appellants conviction, Mr. Kajembe contended that PW3's evidence was that, he saw the appellant taking PW1 into his room and he (PW1) started crying and later told him (PW3) that the appellant did bad habit to him. He had the view that such evidence was circumstantial and could not be relied on. As to PW4's evidence, he argued that the same was not enough to sustain the conviction. He reasoned as such alleging that PW4 did not state whether he examined PW1. That, she did not also state her remarks after examining PW1. That, PW4 also stated during her cross examination that she could not conclude that PW1 had been sodomized.

As to variation of dates, Mr. Kajembe conceded to the appellant's argument that when a specific date, time and place is mentioned in a charge, the prosecution is obliged to prove the same. He fortified his argument with the case of **Marki Said @ Mbega vs. Republic** (Criminal Appeal 204 of 2018) [2022] TZCA 667 TANZLII in which the case of **Salum Rashid Chitende vs. Republic,** Criminal Appeal No. 204 of 2015 (unreported). He contended that PW1 did not testify as to the date stated in the charge. That, on the other hand, PW2 mentioned June 2022 while PW3 stated two diverse dates being, June, 2022 06.07. 2022. In the circumstances, he supported the appellant's stance that the charge was not proved beyond reasonable doubt.

With regard to non-calling of material witnesses, he contended that the investigator was an essential and material witness in the case to prove the date the offence took place and in that, prove the charge. He argued so in consideration of the holding in **Director of Public Prosecution vs. Sharif s/o Mohamed @ Athumani & Others** (Criminal Appeal 74 of 2016) [2016] TZCA 635 TANZLII. Mr. Kajembe finalized his submissions by praying for the conviction and sentence of the trial court to be quashed and set aside.

I have considered the grounds of appeal and the submissions of both parties and gone through the trial court record. I find it apparent on the appellant's submission that he only addressed the 1st, 3rd, 5th and 6th grounds. In my view as well, the 7th ground generally covers all the grounds and subject of every criminal case.

In that regard, it was covered by the appellant in his submission on the other grounds. The rest of the grounds are considered to have been abandoned. In determining this appeal, I will first address the 1st ground and thereafter generally deliberate on the rest of the grounds under one point as to whether the case was proved beyond reasonable doubt.

Under the 1st ground, the appellant faults the trial court for failure to comply with the requirement under **section 127 (2) of the Evidence Act**. For ease of reference, I will first quote the relevant provision as hereunder:

> "(2) 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 any lies."

A child of tender age is defined under **section 127(4) of the Evidence Act** as:

> "127(4) For the purposes of subsections (2) and (3), the expression "child of tender age" means a child whose apparent age is not more than fourteen years."

There have been multiple interpretations as to what **section 127(2) of the Evidence Act** requires. See, **Hosea Geofrey Mkamba vs. Republic (**Criminal Appeal No.37 of 2020) [2023] TZCA 17588) **Mathayo Laurance William Mollel vs. Republic** (Criminal Appeal 53 of 2020) [2023] TZCA 52; **Shomari Mohamed Mkwama vs. Republic**

(Criminal Appeal No. 606 of 2021) [2022] TZCA 644; **Ramson Peter Ondile vs. Republic** (Criminal Appeal No. 84 of 2021) [2022] TZCA 608**; Omary Salum @ Mjusi vs. Republic,** (Criminal Appeal No. 125 of 2020) [2022] TZCA 579 **John Mkorongo James vs. Republic** (supra) and; **Godfrey Wilson vs .Republic** (supra) (all from TANZLII).

The procedure is that, prior to taking the testimony of a child of tender age, the trial court would ask questions to assess whether he understands the nature of oath. If the child does understand the nature of oath, then will have him or her sworn or affirmed and record his or her testimony. If the answer is in negation, then the court must secure the child's promise to tell the truth. This was better explained in the case of **George Lucas Marwa vs. Republic** (Criminal Appeal No.382 of 2019) [2023] TZCA 17424 (TANZLII) whereby the Court of Appeal expounded that:

> "It is our conviction that where a witness is a child of tender age, a trial court should at the beginning 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 child does not understand the nature of oath, he should, before giving evidence, be required to promise to tell the truth and not to tell lies. The procedure explained should be reflected on the proceedings of the trial court."

In **Godfrey Wilson vs. Republic** (supra) the Court listed a sample of questions the court could ask the child of tender age to weigh whether he or she understands the nature of oath. The Court stated:

> "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."

In my view, while the trial Court did not specifically ask such questions as stated in **Godfrey Wilson** (supra) which I find not meant to be mandatory. The court did ask PW1, an 8-year-old boy, questions to determine whether he understood the nature of oath. PW1 was asked whether he understood what amounted to the truth and the impact of telling the truth or lies. The proceedings reveal the questions asked as follows:

> *"Court: What is your name?*
>
> *Answer PW1: I am AEM (name withheld)*
>
> *Court: Which class are you?*
>
> *Answer PW1: I am class two at Mungai Primary School.*
>
> *Court: Do you know the nature of telling lies and telling the truth?*

Answer PW1: Yes, I do, the person that speaking lies belong to Satan as compared to the person who speaking (sic) the truth belong to God.

Court: What is the penalty of the person who speaks lies? And the penalty of the person that speaks the truth?

Answer PW1: The person that speaks lies goes to hell, while that one speaks the truth goes to Heaven and see God."

However, I do not think the problem lies on the said questions, but rather on the fact the trial court found that PW1 understood the nature of oath and had sufficient knowledge and alleged he had promised to speak the truth. The exact words on the proceedings are:

> *"Court: This court is of the settled opinion that PW1/the victim knows the nature of oath, and that he has sufficient knowledge and that he has promised to speak the truth as such his evidence shall be received on oath."*

After such finding the trial court commenced recording the evidence of PW1. I agree with both parties that the trial court erred in recording the evidence of PW1 after the purported finding. This is because, such promise was not made by PW1. Nowhere on record is it shown that PW1 ever made such promise. Further, as seen in the cited paragraph, the trial court did not subject PW1 to an oath or affirmation while it stated that his evidence would be received on oath. This clearly shows that neither of the

requirements stated under **section 127 (2) of the Evidence Act** were observed. The implication of nonconformity with the provision was well stated in **George Lucas Marwa vs. Republic** (supra) whereby the Court of Appeal held:

> "…None compliance with the two conditions above, renders the evidence of the child useless, liable to be expunged from the record."

In the foregoing, PW1's evidence is clearly liable to being expunged as it is hereby accordingly done. The 1st ground is thus found with merit.

Being a sexual offence, and in consideration of the position of the law to the effect that the best evidence is that of the victim, the question remaining is whether the surviving evidence suffices to prove the offence beyond reasonable doubt. This calls for examination of the evidence of the rest of the witnesses.

PW2, the appellants grandmother, testified to have learnt of the incident from PW3, her other grandson. She said that PW3 informed her on the incident and that when she asked PW1, he admitted the same. As correctly argued by both parties, her evidence was hearsay as far as the incident is concerned.

PW3, on the other hand, testified that PW1 informed him of the incident. This came after he had stated that he saw the appellant taking PW1 into his room and heard PW1 crying. PW3 also stated

to have informed his mother on what had happened to PW1. Both witnesses did not state the exact date as appearing on the charge. Both claimed the incidence occurred in June, 2022 and when re-examined, PW3 stated that the incident took place on 06.07.2022 while the charge indicated that the incidence took place on 04.06.2022.

Apart from the said contradictions, both witnesses did not state where the said act took place. It was unclear where the offence was committed, and on which date. This rendered the charge unproved as to the date and place the offence was committed. More doubt was cast on the prosecution case by the appellant's defence when he testified to have been arrested on 03.06.2022. The prosecution, however did not bother cross examining him on such fact, which signifies acceptance of the alleged fact. This testimony from the appellant posed a significant doubt on the prosecution case for negating the date the offence was alleged to have been committed. Thus, failure to cross examine on this important point was fatal on the prosecution case. See, **Issa Hassan Uki vs. Republic** (Criminal Appeal No. 129 of 2017) [2028] (9 May 2018) TANZLII.

Further, as contended by both parties, even the evidence of PW4, the doctor that examined PW1, did not suggest commission of the offence. PW4 merely tendered the PF3 which was admitted as exhibit P1. He did not elaborate on how the said examination was conducted. The PF3 indicated that the sphincter muscles were

intact and there were no bruises. Further, the PF3 appears to have been filled on 14.06.2022 and showed that the incident occurred 5 days before. Counting backwards, the date of the incident appears to be on 09.06.2022. This varies from the date indicated on the charge thus adds to the number of contradictions already pointed out by both parties. It creates a reasonable doubt to the prosecution case on the date of the offence, rendering the charge unproved.

Upon observing the prosecution evidence as a whole, I find that not only did the prosecution fail to parade witnesses to prove its case, it also failed to lead its witnesses into providing necessary details.

In the foregoing, I find that the prosecution clearly failed to discharge its burden in proving the case. In **Malik George Ngendakumana vs. Republic** (Criminal Appeal 353 of 2014) [2015] TZCA 295 TANZLII the Court elaborated that the duty to prove the case is two-fold, in that the prosecution must prove that the offence was committed and that the accused committed the same. The Court stated:

> "The principal of law is that in criminal cases the duty of the prosecution is twofold. One, to prove that the offence was committed, and two, that the accused person is the one who committed it."

In upshot, I find the appeal having merit. The conviction and sentence imposed by the trial court are hereby quashed. I order the immediate release of the appellant, unless held for some other a lawful cause.

Dated and delivered at Moshi on this 18th day of March 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA