IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 74 OF 2017

(Originating from the District Court of Temeke at Temeke decision passed by Hon. MS MNZAVA (PDM) dated 4th day of July, 2008)

KHALIDI JUMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order: *16/10/2019*
Date of Judgment: *24/10/2019*

MLYAMBINA, J.

The Appellant one Khalid Juma was convicted of Unnatural Offence Contrary to **Section 154 (i) (a) of the Penal Code Cap 16 [R.E. 2002].** He was sentenced to thirty (30) years imprisonment by the District Court of Temeke at Temeke in Criminal Case No. 53 of 2007. Being aggrieved with the conviction and sentence, he lodged this appeal on six grounds, namely:

1. *That,* the Trial Magistrate grossly erred in law and fact by admitting and considering evidence of PW1 and PW2 the alleged victim procured un-procedural as no *VOIRE DIRE* test was conducted against them in compliance with mandatory provision of Tanzania Evidence Act, Cap 6 (R.E. 2002).

2. *That,* the Trial Magistrate grossly erred in law and fact by not informing the Appellant of his right of summoning the Doctor who was alleged to have examined the victim and filed PF3 (exhibit P1) to testify on its authenticity in compliance with mandatory provisions of **Criminal Procedure Act Cap 20 (R.E 2002).**
3. *That,* the learned Trial Magistrate erred in law and fact by convicting the Appellant in case where the Police Officer who was alleged to have issued out PF3 to PW3 or Officer (s) to whom the crime was first reported were not summoned to testify on same material facts to clear any doubt.
4. *That,* the Trial Magistrate erred in law and fact by convicting the Appellant in a case where the prosecution failed to lead investigatory evidence as to how he was arrested to ascertain whether his apprehension had any connection with the crime.
5. *That,* the Trial Magistrate grossly erred in law and fact by convicting the Appellant on basis of unjustified corroborated prosecution evidence.
6. *That,* the Trial Magistrate erred in law and fact by convicting the Appellant in a case where the prosecution failed to prove his guilty beyond any speck of doubt as charged.

Whereof, the Appellant prayed this court to allow the appeal, quash the conviction and set aside the sentence.

The effort to trace the original records proved futile as per the affidavit of the District Resident Magistrate In-charge of Temeke one Susan P. Kihawa.

Despite lack of original records, as conceded by the Senior State Attorney, Mr. Credo Rugaju, the copy of judgment before the Court which lead to the conviction and sentence of the appellant is not a judgement at all.

The judgment was contrary to **Section 312 (1) of the Criminal Procedure Act Cap 20 (R. E 2002)** going through the impugned decision, there are no point for determination, there are no reasons for determination.

Worse, the judgement contravened the provisions of **Section 312 (2) of Cap 20** (supra) which requires the Magistrate to state the provision when convicting. What the Trial Magistrate did was to reproduce the prosecution evidence. The defence evidence was not considered. The Trial Magistrate made summary of evidence instead of analyzing the evidence.

Needless the afore general observation, as submitted by the Appellant and concede by the Respondent, if the Court is to rely on the copy of judgment, as I hereby do, PW2 was the victim. Her age is not stated.

Further, at page 2 of the decision, it appears PW2 gave evidence not under oath. Going through the entire judgement, there is nowhere to prove that there was a witness who witnessed the act of un-natural offence.

More still, PF3 was tendered by PW3 (the mother). PW4 was the one who used to call the victim to the accused. PW4 did not witness the accused comminuting the offence.

The judgment does not indicate as to what was investigated and the investigation environment done by PW5. Moreover, the judgement does not show if the Doctor who examined the witness was summoned to explain the PF3 or on what effects did the victim get.

Generally, the Judgement in record do not suggest that the prosecution proved its case beyond reasonable doubt as required by the law. In the case **of Jonas Nkize v. Republic** (1992) TLR 213, the prosecution has to prove all the ingredients. For this case, the prosecuting has to prove (i) carnal knowledge (2) must be

against order of nature (3) age of the child (see **Section 154 (1) (a) of the Penal Code Cap 16 [R.E. 2002].**

In the circumstances of this case, I stand guided with the decision of the CAT in the case of **Hamis Shaban (a) Hamis (Ustaadhi)** v. Republic, Criminal Appeal No. 259 of 2010 (unreported) at page (5-6) where the Court observed.

> *"...it is strongly advisable that the court should hold scale of justice"*
>
> *Evenly by examining and coming to a reasonable and justifiable conclusion as to the circumstances surrounding the varnishing of those documents and the likely consequences.*
>
> *The peculiarity of each case must be born in mind"*

Having examined and analyzed the evidences recorded in the impugned decision, I 'm of found view that, even if there could be original records, the prosecution failed to prove its case beyond reasonable doubt.

In the end result, the conviction and sentence meted against the Appellant herein are quashed and set aside. The entire proceedings of the trial court are nullified. The Appellant be acquitted forthwith unless otherwise lawfully held on some other charges. Order accordingly.

Y. J. MLYAMBINA
JUDGE
24/10/2019

Judgment pronounced and dated on 24th October, 2019 in the presence of the Appellant in person and Senior State Attorney Credo Rugaju for the Respondent. Right of appeal explained.

Y. J. MLYAMBINA
JUDGE
24/10/2019