IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 499 OF 2016

SAID s/o SALUM..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Korosso, J.)

dated the 6th day of October, 2016
in
Criminal Appeal No. 6 of 2016

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JUDGMENT OF THE COURT

17th Nov, & 2nd December, 2020

SEHEL, J.A.:

The present appeal arises from the decision of the High Court of Tanzania sitting at Dar es Salaam (the first appellate court) that affirmed the conviction of the appellant but varied the sentence meted to the appellant by the District Court of Kilosa at Kilosa (the trial court).

The brief facts leading to the present appeal are such that; the appellant was arraigned before the trial court for committing unnatural

offence contrary to section 154 (1) (a) of the Penal Code, Cap 16 RE: 2002. It was alleged in the particulars of the offence that the appellant on 6th July, 2015 at about 20.00 hrs at Magubike Village within Kilosa District in Morogoro Region did have carnal knowledge to one SS (name withheld and shall henceforth be referred to as PW2) against the order of nature. After the charge was read to him, he pleaded not guilty. To establish the guilt of the appellant, the prosecution paraded a total of three witnesses and tendered one exhibit, PF3 (Exhibit P1). On his part, the appellant relied on his own sworn evidence and did not bring any other witness.

The story of the three prosecution witnesses goes like this; on 5th July, 2015, Leah Steven (the mother of PW2 and the prosecution witness number one who we shall refer to as "PW1") noticed her son (PW2) not walking properly. She informed his father (the appellant) who was staying with PW2 as the two had separated from their marriage. Upon receipt of the information from PW1, the appellant forced PW2 to disclose to him as to what had happened to him by beating him. PW2 did not say anything to him. Later, PW2 went to his uncle and told him that his father sodomized him and he had been doing it for about a week. The said uncle reported the matter to the village leaders who interrogated the appellant but he denied.

The appellant was then arrested and taken to the police station whereby upon being interrogated by Mariam Alex Mshangi (PW3) he also denied the allegations. PW2 was given PF3 and was taken to hospital for medical examination which revealed that he had bruises around the anal area.

The appellant in his sworn testimony maintained that he did not do such an act and that PW2 was tutored by his mother to lie and his son likes to tell lies.

The trial court after considering the evidence of the three prosecution witnesses and one exhibit from the respondent Republic found the appellant guilty. It convicted and sentenced him to life imprisonment. His first appeal to the High Court against conviction was dismissed save for the sentence which was varied to 30 years imprisonment. Still protesting his innocence, the appellant filed the present appeal on the following grounds:-

1. That, *the two courts below erred in law and fact for acting on bare assertion that the victim (PW2) was sodomised without positive evidence showing the exact time and place where the alleged offence was committed.*
2. *That, the first appellate court erred in law and fact by upholding the medical report- PF3 (exhibit P1) despite that the same was un procedurally tendered by the prosecutor (PP) who cannot assume a*

role of a prosecutor and a witness of tendering the PF3 at the same time.

3. *That, the judgment of the two courts below was fatally defective due to that the lower court failed to consider the defence case.*
4. *That, the first appellate court erred in law by sustaining the appellant's conviction in the case where the appellant was deprived of his right of having his witnesses in his defence as he opted at the defence stage.*
5. *That, there is failure of justice as the PF3 (exhibit P1) which is the basis for the appellant's conviction was issued on 8/7/2015 but the observation filled in the PF3 was made on 8/8/2015.*
6. *That, there was irregularities or procedural errors apparent on the face of the record as the trial magistrate failed to explain in full to the appellant the options available to him in giving his defence as demanded by law, but also the defence did not close its case.*
7. *That, the first appellate court erred in law by upholding the evidence of the victim (PW2) received or recorded via un procedural voire dire test which contained no legal procedures of voire dire test.*

Before us, the appellant appeared in person, unrepresented, via video link conference from Ukonga Prison, whereas Faraja George, learned Senior State Attorney assisted by Ms. Nancy Mushumbusi, learned State Attorney, appeared for the respondent Republic.

Initially Ms. George did not support the appeal but after being referred to the trial court's finding and that of the first appellate court, she changed her line of argument and supported it. In her support, she hinged her submission mainly on lack of corroboration on PW2's evidence and PF3 was un procedurally tendered and admitted.

Starting with the evidence of PW2, the learned Senior State Attorney argued that the evidence of PW2 which appears at pages 10 to 11 of the record of appeal, was received without an oath hence it required corroboration. She pointed out that the trial court found corroboration from the evidence of PW1 whose evidence was hearsay because she did not witness the appellant sodomizing PW2. It was the view of Ms. George that hearsay evidence could not corroborate the unsworn evidence of PW2.

She further added that even the *voire dire* test was not properly conducted by the trial magistrate as he did not indicate whether the child understands the duty of speaking the truth. To support her stance, she referred us to pages 10 to 11 of the record of appeal and argued that the witness (PW2) was of tender age because at the time he was giving evidence, he was 13 years old. She added that the law, prior to the amendment of section 127 (2) of the Evidence Act, Cap. 6 R.E 2002 ("the

Act"), required the trial magistrate to satisfy himself that the child understands the nature of oath or is of sufficient intelligence and he knows the meaning of telling the truth. She contended that the trial magistrate partly complied with that procedure by seeking from PW2 about the nature of oath and not about telling the truth. With such deficiency, she said, the evidence of PW2 is treated as unsworn evidence.

Addressing us on the flouting of procedure in tendering Exhibit P1 which was the second ground of appeal, Ms. George argued that according to the record of appeal, it shows that PF3 was tendered by an incompetent person, the Public Prosecutor ("the PP") who was not a witness and added that after its admission it was not read out to the appellant for him to know and understand its contents. She accordingly urged us to expunge Exhibit P1 from the record of appeal.

With the above submission, the learned Senior State Attorney contended that the prosecution failed to prove its case to the required standard of proof beyond reasonable doubt. She therefore, urged us to allow the appeal by quashing the conviction, setting aside the sentence and let the appellant free from prison custody.

The appellant, on his part, had nothing to rejoin apart from beseeching us to allow the appeal with an order of his release from the prison custody.

Having considered the evidence on record and heard the submission from Ms. George we entirely agree with her that the appeal has merit. We shall start by stating the obvious that the testimony of PW2 was received by the trial court in 2015 prior to the amendment of sub-section (2) of section 127 of the Evidence Act, Cap. 6 in 2016 through the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016). The Act required the trial judge or magistrate to conduct *voire dire* test to a witness of a tender age in order to satisfy himself whether the child understands the nature of an oath, or is of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. That position of the law was lucidly stated in the case of **Jafason Samwel v. The Republic**, Criminal Appeal No. 105 of 2006 (unreported) that:

> *"This provision (section 127 (2) of the Evidence Act, Cap. 6 prior to the amendment) imposes the duty on the trial magistrate or judge to investigate whether the child witness knows the meaning of an oath so as to give evidence on oath or affirmation. If the child does*

not know the meaning of an oath, then the trial magistrate or judge must investigate whether he is possessed of sufficient intelligence and understands the duty of speaking the truth. If he is satisfied that the child is possessed of sufficient intelligence and understands the duty of speaking the truth, he may receive his evidence though not given on oath or affirmation. In determining whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth, the trial magistrate or judge must conduct a voire dire examination. He may put some questions to the child and from his answers he may be able to determine whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth. How a voire dire test is conducted appears to be a matter of style. But recording questions and answers appears to be a better way because this enables even an appellate court to know whether the questions asked and the answers given were such that any court of law would have come to the conclusion that the child was possessed of sufficient intelligence and understood the duty of speaking the truth."

As rightly submitted by the learned Senior State Attorney, where the reception of the testimony of a child of tender age is done without properly conducting *voire dire* examination that evidence is reduced to a level of unsworn evidence and it requires corroboration before it can be relied upon to convict an accused person.

In the case of **Nguza Vikings @ Babu Seya & 4 Others v. The Republic,** Criminal Appeal No. 56 of 2005 (unreported) where the trial magistrate did not properly conduct the *voire dire* test as she failed to record the questions that were put to the witnesses and their answers and instead she went to record what she found out of the child witnesses, the Court said:-

> *"For the failure to comply with the procedure for conducting "voire dire" examination properly, the issue before us is what would be the effect of the omission? Fortunately this is an issue which need not detain us. As correctly pointed out by both the learned counsel for the appellants and the learned Principal State Attorney, the position of the law is settled. The omission brings such evidence to a level of unsworn evidence of a child which requires corroboration."*

(See also the cases of **Mohamed Sainyeye v. The Republic**, Criminal Appeal No. 57 of 2010 and **Kimbute Otiniel v. The Republic**, Criminal Appeal No. 300 of 2011 (All unreported)).

In the present appeal, there is no dispute that the *voire dire* test was improperly conducted by the trial magistrate and the trial magistrate received the evidence of PW2 without oath or affirmation. Therefore, his evidence was unsworn evidence and the trial court found that it required corroboration.

Here we wish to point out that the first appellate court found that *voire dire* examination was properly conducted. With due respect, our perusal of the responses of PW2 appearing at pages 10 and 11 of the record of appeal which the learned Senior State Attorney invited us to look, we failed to go along with the finding of the first appellate court. There is nothing in the record to show that the *voire dire* test was properly conducted. For better appreciation as to what transpired at the trial court we take liberty to reproduce the relevant extract of the trial court's proceedings and it reads as follows:-

"PW2:- Voire dire

My name is (he toid the trial court his name but for the purpose of concealing his identity we shall hide it), I am 13 years old. I am studying at (he told the trial court the school he attends of which we shall also hide it), I am in class three, I was staying with my father, I am a Muslim, and I don't understand the nature of oath.

Court:- it appears that the witness has sufficient intelligence but he does not understand the nature of an oath thus he is not sworn."

The above excerpt of the proceedings shows clearly that the provision of section 127 (2) of the Act was partly complied with by the trial magistrate. He did put a question to PW2 as to whether he understood the nature of oath but he did not ask the child as to whether he understood the duty of speaking the truth.

In reaching to its finding that there was compliance in *voire dire* examination the first appellate court relied on the case of **Kimbute Otiniel v. The Republic** (supra) of which we entirely agree that:

"Where there is a misapplication by a trial court of section 127(1) and/or 127(2) the resulting evidence is to be retained on the record. Whether or not any

credibility, reliability, weight or probative force is to be accorded to the testimony in whole, in part or not at all is at the discretion of the trial court. The law and practice governing the admissibility of evidence; cross-examination of the child witness, critical analysis of the evidence by the court and the burden of proof beyond reasonable doubt, continue to apply."

In the present appeal, the trial magistrate correctly retained the unsworn evidence of PW2 but in its assessment of giving credence and weight it found that such unsworn evidence required corroboration. Therefore, in convicting the appellant, the trial magistrate used the evidence of PW1 to corroborate the unsworn evidence of PW2. And this takes us to the issue as to whether the evidence of PW1 had any evidential value for it to corroborate the evidence of PW2?

We have revisited the evidence of PW1 appearing at page 10 of the record of appeal and we find that it has nothing to corroborate the evidence of PW2 as it was held by the first appellate court when it said:-

"...the evidence of PW1 does not in any way assist the court to either find that PW2 was sexually assaulted because the only evidence she gave was the improper

walk of PW2 which raised suspicious on her part, but PW2 never told her anything."

We are of the same observation that PW1 did not witness the act of sodomization. She heard it from the uncle that PW2 was sodomized by the appellant. The rest of what she told the trial court was that she saw the child not walking properly and was curious to know the reason behind it. She tried to find the reason but PW2 did not disclose it to her. In that regard, we concur with the learned Senior State Attorney that the evidence of PW1 is a pure hearsay and it being hearsay is not capable of giving corroboration to the evidence of PW2. Her evidence, therefore, is hereby discarded.

The prosecution case also relied on the PF3 (Exhibit P1) which was, as observed by Ms. George, unprocedurally tendered by the PP as he was not a witness. Similarly, its admission was contrary to the laid down procedure because it was not read out after it was cleared for its admission. Although Exhibit P1 was not relied upon by the trial court to convict the appellant but the first appellate court used it in corroborating the unsworn evidence of PW2. The PP being not a witness he could not be examined or cross-examined on the PF3. Thus, it was wrong for the PP to assume the role of a witness.

In **Thomas Ernest Msungu @ Nyoka Mkenya v. The Republic,** Criminal Appeal No. 78 of 2012 (unreported) we observed that:

> *"A prosecutor cannot assume the role of a prosecutor and a witness at the same time. In tendering the report the prosecutor was actually assuming the role of a witness. With respect, that was wrong because in the process the prosecutor was not the sort of witness who could be capable of examination upon oath or affirmation in terms of section 198(1) of the Act."*

We fully subscribe to that position. On the second limb regarding failure to read out the PF3 in court, the record bears out that after the PF3 was admitted it was not read out in court. It is now settled law that once a document has been cleared for admission and admitted in evidence, it must be read out in court. Failure to do so occasioned a serious error amounting to miscarriage of justice and that document ought to be expunged from the record. See:- **Sunni Amman Awenda v The Republic,** Criminal Appeal No 393 of 2013; **Jumanne Mohamed and 2 Others v. The Republic,** Criminal Appeal No. 534 of 2015; **Manje Yohana and Another v. The Republic,** Criminal Appeal No. 147 of 2016; and **Issa Hassan Uki v. The Republic,** Criminal Appeal No. 129 of 2017 (All unreported).

Accordingly, Exhibit P1 ought to be and we do hereby proceed to expunge it from the record because there was a flouting of procedures in tendering and admitting it.

After disregarding the evidence of PW1 and expunging Exhibit P1 from the record, there is no any other evidence left to corroborate the unsworn evidence of PW2 worth for sustaining a conviction of unnatural offence against the appellant.

Before we pen off, we need to say something on the way the trial magistrate appreciated and articulated the evidence presented before her. We are dismayed to find that the trial magistrate in her judgement twisted the facts presented before her to her own personal view. In her judgment, the trial magistrate translated the words *"if I say 'kiduka kitafilisika'"* (meaning the shop will deplete) to mean "*....on grounds of superstition on the belief that he would get rich."* 'Superstition" was the trial magistrate's own perception. It is not borne out of the record of proceedings. Nonetheless, we wish to remind magistrates on their judicial office oath that they should decide cases according to the presented facts and evidence and apply the legal principles and laws on those facts and evidence with no more. They should at all time put aside personal biases, attitudes, emotions,

and other individuating factors in the judgment for the preservation of fair trial.

With that said, we find the appeal has merit. We, accordingly, quash the conviction and set aside the thirty years sentence imposed to the appellant. We order for the immediate release of the appellant, **Said s/o Salum**, from custody unless otherwise held for other lawful reasons.

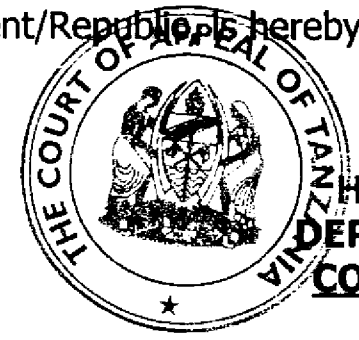
DATED at **DAR ES SALAAM** this 30th day of November, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2020 in the presence of the appellant in person linked – via video conference from Ukonga Prison and Ms. Faraja George, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL