IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBAWANGA

AT SUMBAWANGA

CRIMINAL APPEAL NO. 66 OF 2023

(Originating from the District Court of Sumbawanga at Sumbawanga, Criminal Case No. 07 of 2023)

SAMSON COSMAS MWANANZUMI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

MWENEMPAZI, J:

The appellant was convicted for an Unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap. 16 R.E.2022 and sentenced to serve a term of life imprisonment. The trial court also ordered the appellant to compensate the victim Tshs. 1,000,000/= for injuries suffered. He is aggrieved with the conviction and sentence hence the present appeal. This appeal was filed through the services of Mr. James Lubusi, learned Advocate who has been instructed to represent the appellant.

In the trial court it was alleged that the accused person, Samson Cosmas Mwananzumi on the 5th day of January, 2023 at EFATA-ITWELELE area within Sumbawanga Municipality and Rukwa Region did have carnal knowledge with one ZKY, a boy aged thirteen (13) years old against the order of nature. When the charge was read over and explained to him, he denied that he committed the offence and the same stance was maintained at the preliminary hearing conducted under section 192 of the Criminal Procedure Act, Cap. 20 R.E. 2022.

In this appeal the appellant's advocate filed a total of eleven (11) grounds of appeal, which for the sake of brevity and other reason which will be obvious herein below I will not reproduce them.

1. That the trial court erred in law for not considering the age of the accused as he was a minor aged 16 years old.

The appellant's counsel prayed for this court to allow the appeal, quash conviction and set aside the mandatory life sentence.

At the hearing Mr. Jerinus Mzanila and Ms. Maura Tweve, learned State Attorneys appeared for the respondent and the appellant appeared in

person. His advocate did not enter appearance without notice although on the date the appeal was scheduled for hearing, the advocate was present and therefore he had sufficient notice. The appellant opted to proceed and fend himself. The appellant also opted that the counsel for the responded should submit first ant he will respond to the submission by the counsel for respondent.

Mr. Jerinus Mzanila, State Attorney submitted that they have read all the eleven grounds of appeal and they have formed their opinion supporting the appeal based on the first ground of appeal that the trial magistrate grossly erred in law and in fact not considering the age of the accused person that he is a minor aged 16 years old.

The counsel submitted that the ground is purely legal. In the proceedings the main case was filed in the trial Court on the 20th January, 2023. That is the date the charge was read over and explained to the accused person. On the date the accused objected to his particulars especially the age. He informed the trial Court that he was 16 years old. Based on the information the State Attorney prosecuting the case prayed for the inquiry to be conducted on the age of the accused. The trial Court granted the prayer,

however, that was not done. The prayer was again repeated on the 2nd February, 2023 when the case was called for preliminary hearing. The prayer to conduct inquiry was not complied with until when the case for the prosecution was closed.

On the 10th May, 2023 when the case was for defence hearing, at page 27 of the proceedings, when the accused was taking oath, he said he is 16 years old. At the point the prosecution objected to the particulars and prayed the trial Court to recognize that the accused is 18 years old. The trial magistrate at page 24 of the proceeding ruled as follows:

> *"I am of the settled mind that the objection made by the State Attorney is meritorious and the accused age is 18 years. The alleged age of 16 years is an afterthought".*

Until the end of trial, an inquiry on the age of the accused was not conducted according to the law. Obviously, by the ruling dated 10th May, 2023 the trial Court misdirected itself as to the correct age of the accused in the absence of scientific.

The counsel for respondent submitted that the issue of age was not a mere thinking but a fact raised by the accused from the date a charge was read over and explained to him. Age is an issue of law though it is proved in evidence.

In various decisions, the law is that where the accused; raises an issue of age, especially where he alleges to be under 18, the Court is duty bound to order an inquiry to be made to confirm the age. The inquiry is important because it aims to achieve three things. **One**, to make the Court establish of it has jurisdiction and adopt proper procedure. **Two**, to be able to know the proper procedure of receiving evidence, and **three** to decide on the proper punishment fit for the accused in case he is convicted.

As to how an inquiry should be conducted, it was clarified in the case of **Athanas Mbilinyi Vs. The Republic,** Criminal Appeal No. 275 of 2020, Court of Appeal of Tanzania at Iringa (unreported). In the cited case at page 4 paragraph 3 the Court of Appeal of Tanzania directed on the proper procedure to be adopted when age is at issue, especially where the accused declares to be under 18, the Court must direct inquiry under section 113 and

114 of the Law of the Child, [Cap 13 R.E 219]. The said provisions are as follows:

> ***113.***(1) *Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person.*
>
> (2) *The court shall take such evidence at the hearing of the case which may include medical evidence and, or DNA test as is necessary to provide proof of birth, whether it is of a documentary nature or otherwise as it appears to the court to be worthy of belief.*
>
> (3) *A certificate purporting to be signed by a medical practitioner registered or licensed under the provisions of the law governing medical practice in Tanzania as to the age of a child shall be*

sufficient evidence and shall be receivable by a court without proof of signature unless the court orders otherwise.

(4) An order or judgement of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court and the age found by the court to be the age of the person so brought before it shall, for the purposes of this section, be deemed to be the true age of that person.

(5) Medical evidence and or collection of blood for the purpose of DNA from the child shall be conducted in the presence of a social welfare officer.

***114.**(1) Where it appears to the court that any person brought before it is of the age of beyond eighteen*

years, that person shall, for the purposes of this section, be deemed not to be a child.

(2) Without prejudice to the preceding provisions of this section, where the court has failed to establish the correct age of the person brought before it, then the age stated by that person, parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person.

In compliance to the section, the Court has a duty to issue an order for inquiry and educate the accused the kind of proof required to be adduced to prove an age which includes birth certificate or to call his parents or guardians to come and testify.

In the present case that was not done. According to the cited case, where the Court fails to comply with the law, then the Court will rely on the age pronounced by the accused. Therefore, by failing to conduct an inquiry, it is

obvious there was injustice on the appellant since the results would have decided the outcome of the charges.

The Court of Appeal of Tanzania in the case of **Athanas Mbilinyi Vs. Republic** (supra) concluded by nullifying the proceedings, quashed the judgement and set aside the sentence meted to the appellant and ordered that the case be tried de novo subject to the inquiry being made on the age of the appellant. The counsel for the respondet has prayed that this Court nullifies the proceedings in the trial Court and order for the retrial of the case in the Court of competent jurisdiction where also inquiry will be conducted on the age of the accused.

The appellant after hearing the submission by the counsel for the respondent, simply informed this Court that he has nothing to add.

I have as well read the record of the trial Court and I have appreciated that the issue of age popped up early on the date a charge was read over to the accused person. It is as well true that it continued to be an issue every time an occasion referring to the age of the accused person would arise. That was so until when the Court ruled that the fact that the accused is 16

years old is an afterthought. That was when the accused was taking an oath for the purpose of testifying as defence witness. The position taken by the trial magistrate tainted the trial proceedings with unfairness.

As rightly submitted by the counsel for the respondent, Mr. Jerinus Mzanila, learned State Attorney, the trial Court ought to have taken either of the two-position pronounced by the law and according to the law: Conduct an inquiry on the age of the accused according to section 113 of the Law of the Child, [Cap 13 R.E 2019] or the position provided by the provisions of section 114(2) of the Law of the Child [Cap 13 R.E 2019]. Therefore, in our case the accused said he is 16 years old, which under provisions of section 4 of the Law of the Child Act (LCA) he is a child.

In the cited case **Athanas Mbilinyi Vs. The Republic** (supra) it was held that failure to conduct an inquiry on an age of the accused person has the effect of occasioning miscarriage of justice on the part of the appellant as it leaves a lot to be desired. The reasons are that the accused if is under age, he would be arraigned before the Juvenile Court in terms of section 98(1) (a) of the Law of the Child Act and not the District Court, and if found guilty he would have been sentenced accordingly. That is in terms of the provisions

of the Law of the Child Act. In the case of **Furaha Johnson Vs. The Republic, Criminal Appeal No. 452 of 2015 [2016] TZCA 620 (1, August, 2016**) it was held that:

> *"Since the appellant at the time of his arraignment and trial was child, he was not triable by the District Court, but a Juvenile Court. The trial Court, therefore lacked* ***Jurisdiction ratione personae*** *to try the appellant. This alone rendered this trial a nullity. But even if the appellant had been tried by the appropriate Court, the conduct of a trial in absence of a social welfare officer would have equally rendered the trial a nullity".*

On the other point, since, I had the opinion that the trial magistrate after failure to conduct inquiry would have relied on the age pronounced by the accused in line with section 114(2) of the Law of the Child Act, the sentence meted to the accused person was also not justified.

In the case of **Robert James @ Msabi Vs. The Republic,** Criminal Appeal No. 379 of 2015 [2016] TZA 236 (21 April, 2016] it was held that:

"As the regards the sentence, we should express at once that upon the appellant's consistent claim that he was seventeen years of age, the trial Court should have taken a breather to call such material evidence as would have enabled it to ascertain the claim before passing sentence. To the extent that the claim was not ascertained, we cannot say with certainty that the custodial sentence was legal in the face of section 119(1) of the Law of the Child Act, No. 21 of 2009 (the Act). Incidentally, the referred provision imperatively bars a custodial sentence as against a child who is defined by section 4(1) of the Act to be a person under the age of eighteen (18)".

The counsel for respondent proposed that a trial *de novo* be ordered by this Court. However, I have read the record of the trial Court in particular the proceeding and I am satisfied and have an opinion that an order for retrial will occasion injustice to the appellant (*see* ***Fatihali Manji Vs. The Republic [1963] E. A 341***).

For the reasons; I find merit in the appeal and allow it. The appellant's trial is nullified, conviction and sentenced quashed and set aside. I order

the immediate released from prison of the appellant, unless he is otherwise lawfully being held.

It is ordered accordingly.

Dated and signed at Sumbawanga this 06th day of October, 2023.

T.M. MWENEMPAZI

JUDGE

Judgment delivered in Court in the presence of the appellant and Mr. Mathias Joseph and Mr. Frank Mwigune, learned State Attorneys for the Republic.

T.M. MWENEMPAZI

JUDGE

06/10/2023