IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 2 OF 2023

(Originating from the decision of the District Court of Kinondoni at Kinondoni before Hon. A. M. Lyamuya PRM dated 28th day of September 2022 in Criminal Case No. 316 of 2020)

HASSAN IBRAHIM ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT:

31st Oct & 09th Nov 2023:

KIREKIANO, J.:

Before the District Court of Kinondoni the appellant herein was convicted of the offence of unnatural offence c/s 154 (1) (a) and (2) of the Penal Code Cap 16. He was eventually sentenced to custodial sentence of life imprisonment. The allegation which led to the appellant's conviction and sentence was that, on diverse dates between September 2019 and July 2020 at Bunju "A" Dar es Salaam the appellant did have carnal knowledge of a boy aged 10 years against the order of nature. The boy's name is withheld, he will be referred to as "the victim".

The substance of the evidence tendered in the trial is that PW1 Mosi is a mother of six children. One of those children according to the birth certificate (Exhibit P1) is the victim a boy aged 10 years. On 18/09/2019 PW1 was washing the victim's clothes. In the process she found the clothes dented with blood. She suspected something fishy might have happened to the boy. When she physically inspected the victim, she was more suspicious. In the process of inquiring into what happened, the victim disclosed that he was sodomised by the appellant who worked at video point *"banda la video"*.

The matter was reported to the police, it appears that before the appellant was arrested, while PW1 was looking for him, he was neither at school nor at the mosque. When he came back home, he told PW1 that he was sodomised again by the appellant.

PW1 decided to transfer the victim to Tabora where he stayed for six weeks. When he returned to Dar es Salaam, the victim went back to the appellant at video point. This time the appellant was finally arrested after the boy had pointed him to PW1.

After the investigation, the police at Mbweni arrested the appellant. The victim was examined at Mwananyamala Hospital, according to the testimony of PW3 Dr Julius Riwa and the medical examination report (Exhibit P-2), the victim's anal parts were found to be very loose. This doctor gave his expert opinion that there was a blunt object inserted into the victims' anal parts.

According to the victim, between September 2019 and July 2020, he would skip classes and go to watch videos at Bunju "A" where he met the appellant whom he knew as Hassan. In his testimony, he narrated how the appellant sodomized him on several occasions and threatened to kill him if he disclosed this to anyone.

The appellant's defence was complete denial. His version was that he worked as a technician fixing television decoders. This case was framed by his boss who had a mistress. The said mistress was also his girlfriend. He came from Kigoma and worked at Bunju from 25/5/2019 but he later moved from Bunju to Kinondoni on 26/6/2020 thus he was not at the scene of the crime.

DW2 Rashid Ernest his evidence was to the effect that the appellant had an affair with the mistress of their boss. When Hassan was identified by the victim in the company of his mother, DW2 was also present.

The trial magistrate found that the charge was proved in the required standard. It relied on the evidence of the victim and the corroborating evidence of his mother PW1 and the doctor. It also rejected the appellant's defence of alibi on the strength of the victim's testimony on how the appellant sodomized him on several occasions.

Dissatisfied with that decision, the appellant initially filed five grounds of appeal however during the hearing he added one ground and in the course of the hearing he condensed the same into three major grounds thus;

1. *That, the learned trial magistrate erred in law to convict the appellant based on invalid evidence of a child of tender age (PW2) whose promise to tell the truth and not lies as provided for under section 127 (2) of the Evidence Act, (Cap 6 R.E 2022) was incomplete.*
2. *That, the learned trial magistrate erred in law in believing the testimony of PW2 (victim) on visual identification of the*

appellant without assessing the credibility and probity of the same in line with defence evidence.

3. *The appellant was convicted on prosecution evidence which was not proved beyond reasonable doubt.*

the appellant was unrepresented, Miss Dorothy Massawe Principal State attorney represented the republic. This appeal was, at the request of the appellant heard by way of written submissions.

Submitting on the first ground, the appellant submitted that according to the record, the victim was of tender age. His testimony was received in contravention of section 127 (2) of the Tanzania Evidence Act [RE 2019]. He argued the promise of the victim, to tell the truth, ought to be in direct speech and complete. In support of this argument, he cited the decision in **John Mkorongo James v Republic, Criminal Appeal No. 498/2020 page 3.** He thus prayed this evidence to be expunged from the record.

On the 2nd ground, the appellant challenged evidence of identification by the victim. He wondered why the boy did not mention the appellant by name in the first place before going to where he worked. He wondered how the victim knew the appellant. He cited the decision in **Marwa Wang'ati Mwita v Republic [2002] TLR 39** that, the ability of the witness to

mention a suspect at the earliest stage is the important assurance of his reliability.

As such the appellant emphasized that there was no proper evaluation of evidence by the victim PW2. He cited the decision in **Republic v Mohamed Bin Allui** [1947] 9 EACA 72 and **John Abdallah v Republic** [2003] TLR 201 that: -

> *"In a matter of identification, it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of eye witness".*

The appellant also submitted that while the victim said "*kaka wa banda la video*" in the first place and on another occasion, he named "Hassan". It was improbable for the appellant to be arrested considering the appellant was arrested almost after year after the offence was reported.

On the third, grounds it was submitted that there was a variance of essential facts with the charge, citing example, he submitted that while the appellant was arrested on 8/07/2020, the medical examination was conducted on 9/7/2020. As such PW1 stated that the offence was detected on 18/9/2019 and the appellant was arrested on July 2020. In this, the

appellant cited decisions in **Mashala Njile v Republic**, Cr Appeal No. 179 of 2014 and **Zengo Mahema and others v Republic** that

> *"Variance in the evidential facts from the testimony of prosecution witness renders the charge defective."*

The respondent republic submitted on the first ground that the evidence of PW2 the victim was taken properly. It was argued that even if there was a failure to conduct a proper voire dire test then the evidence can be served under section 127 (6) of the Evidence Act. The respondent's stance was that though the evidence was not received under oath the same could be received if the witness made a promise.

The Republic cited the decision on **Mohamed Athuman vs. Republic**, Criminal Appeal No. 412 of 2015 to the effect that even on failure to conduct *voire dire*, conviction could still be found in terms of section 127 (6) of the Evidence Act that is relying on the evidence of the victim.

On the second ground, it was argued there was no question of improbable evidence. The prosecution case cleared doubt and the trial court decided on the strength of evidence having been satisfied with the

competence of the witness in terms of sections 127 (1) 145 (1) and (2) of the Evidence Act.

On the second ground, the respondent submitted that the case was decided on the strength of the prosecution case which had the burden to prove the charge beyond reasonable doubt. The respondent did not comment on the complaint that DW2 evidence was not considered.

It was the respondent's submission that the victim named the appellant by name and explained how he was sodomized by the appellant on several occasions. As such, the identification was done in daylight. In this, the conditions were favorable for correct identification. To support this stance a decision in **Raymond Francis v Republic** [1994] TLR 100 was cited.

In his rejoinder, the appellant referring to the evidence on record argued that what PW2 did was promise to tell the truth. He did not promise not to tell lies. He reiterated the position in **John Mkorongo** arguing that promise should be in direct speech and complete. On identification, he reiterated his submission in chief that this court should consider the facts in the testimony of PW2 which corroded the credibility of PW2.

I will start with the first ground on the legality of reception of evidence of the victim under section 127 (2) TEA. According to the record, the victim was 10 years old when he testified this was according to undisputed evidence in (exhibit P1). The trial court did put questions to this witness to test his understanding of oath. It appears the style used was voire dire. In the end, the trial court found that the victim did not understand the nature of the oath and then proceeded to receive his testimony under promise.

The appellant's complaint is about the manner the promise was extracted. That is, it did not meet the standard. I have considered the decision in **John Mkorongo James** cited by the appellant on the manner of extracting the promise. The court of appeal was dissatisfied with how the promise was extracted, and went on to expunge the evidence and remarked that;

> *'It is recommended that the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete'.*

Admittedly, that was the position in the cited case. Having read and considered this decision, I am of settled view that the same is

distinguishable here. This is because, in that case, there was no record of what the witness said before the trial court recorded that the witness was under promise. In this appeal, it is clear the witness (victim) promised in his words to tell the truth.

Part of the except of the record on page 13 of the proceeding reads;

> *"Ndio naahidi nitasema kweli.*
>
> ***Court;***
>
> *"The witness does not understand the meaning of oath but he understands the duty of speaking and telling the truth he also possesses sufficient intelligence and understands the questions put to him, his evidence may be* ***received though not on oath/affirmation witness promised to speak the truth.*** *(Emphasis supplied)*

On the aspect of whether the promise was complete, I find this to be in the affirmative. My position is fortified by the recent decision of the court of appeal on this area in **Mathayo Lawrence William Mollel vs Republic (Criminal Appeal No. 53 of 2020) [2023] TZCA 52. In that appeal T**he Court of Appeal was faced with a similar complaint of completeness of promise, and held;

> *"We find difficulties in agreeing with him. We understand the legislature used the words "promise to tell the truth to the court and not to tell lies". We think tautology is evident in the phrase, for, in our view, 'to tell the truth" Simply means "not to tell lies"* ***So, a person who promises to tell the truth is in effect promising not to tell lies.***

Having considered the record of the trial court and given the decisions cited above, I am of the firm view that the evidence of the victim was properly received. The first ground of appeal fails in want of merit.

The second ground is the complaint on identification. It is argued that there was a contradiction in the evidence of PW1 the victim's mother when describing a person who abused him that is the victim named the person "*Kaka wa banda la video*" and at the Police, he named Hassan.

I am alive with the duty of this court to address the inconsistencies if any and decide whether they touch the root of the matter. According to this witness, PW1 Mosi she narrated how the victim named the appellant. It is on record PW1 the victim's mother when she wanted to know who abused her son the victim narrated to her that it was a young man at a video point "*Kaka wa Banda la video"*

As such while at the police PW1 heard the victim telling the police it was Hasan who Sodomised him and that he went to that video point (*banda la video*) on Monday, Tuesday, Wednesday and Friday.

Now while testifying the victim himself maintained this version of the "*banda la video*" and named Hassan and as such made dock identification. He also gave evidence that he was sodomised not once by the appellant and also met Hassan again after he had come back from Tabora. On page 14 of the proceedings, he said;

> *Hassan warned me not to tell anyone we did it many times, and every time he would say to me ukisema nakuua I did not tell my mom I was scared Hassan will Kill me*

As such at page 15 the victim said

> *My mom went to police to report the police officer went to look for the accused person on that date I and my mom found Hassan and I pointed at him there were many people but I knew Hassan. I am the one who pointed him and my mom called the police and a police officer came and arrested him.*

I have scanned the victim's evidence and that of his mother (PW2). What is on record is that the witness gave more details on the said *Kaka wa Banda la Video*. I see nothing worth a contradiction.

I have as such considered the defense case on this aspect. The substance of DW2 for example was to corroborate the appellant's story that he was in an affair with the mistress of their boss. However, he told the court that when arrested Hassan (the appellant) was identified by the victim in his presence. It is based on this evidence I agree with the trial court that the victim (PW2) knew the appellant very well. As such based on what appears on record, I do not see why this witness cannot be trusted.

Now I also wish to address the defence of alibi as intimated by the appellant in his submission. It is not in dispute that the appellant did not give notice of this defence as required under section 194 (1) of the **Criminal Procedure Act Cap 20.** However, I find it pertinent to recap the law on defence of alibi in this situation as was succinctly laid down in **Charles Samson V Republic** [1990] TLR 39: - that

> *"(i) The court is not exempt from the requirement to take into account the defence for alibi, where such defence has not been disclosed by the*

accused person before the prosecution closes its case.

(ii) where such disclosure is not made, the court though taking cognizance of such defence, may, in its discretion accord no weight of any kind to the defence."

The appellant said he came from Kigoma and worked at Bunju from 25/5/2019 but he later moved from Bunju to Kinondoni on 26/6/2020. The offence was committed on diverse dates between September 2019 and July 2020. When all is said and considered having also taken note of the defence and its relevance on dates coupled with strong prosecution evidence I find that the trial court correctly exercised its discretion not to accord any weight to this defence.

The last question I wish to address is the complaint that there was between the charge and the essential facts. I wish to appreciate the decision in **Mashala Njile v Republic, Cr Appeal No. 179 of 2014 and Zengo Mahema and others v Republic cited by the appellant.** However, it is not in every case variance of some facts and charges will render the charge defective. I am also aware of the decision in Michael **Chaula v R (Criminal Appeal 403 of 2020) [2023] TZCA 43 (22 February 2023.that;**

The variance between the evidence and the time of the commission of rape cannot render the charge unproved. Such defects can be resolved by reading the evidence as a whole

I have reflected on this complaint and I am of the view that the appellant in his submission missed the point from the proceedings that on 22/03/2021 when the case was for preliminary hearing, the prosecution amended the charge which he accordingly pleaded thereto. The same indicates that the offence was committed on the diverse dates of September 2019 and July 2020.

In the last ground, I have also considered the element of penetration. The evidence by the victim on page 14 of the proceeding, was recorded by the trial court and reads;

"Hassan aliniambia inama nami nikainama na akaniingizia dudu yake matakoni kwangu!

It appears the trial court clearly understood the victim on this aspect of penetration this court equally understood this witness on what he meant. ***Hassan Bakari @ Mama Jicho Vs Republic Criminal Appeal No. 103/2012 CAT Mtwara*** considered. There was also corroborating

evidence from the doctor who examined the victim PW3 and the findings Exhibit P 2. There was no evidence from the defence disputing that the boy sodomised was I thus find that the charge was proved in the required standard. The third ground fails.

In the end, I find that this appeal is devoid of merit and stands dismissed in its entirety. The conviction and sentence of the trial court is sustained

THE HIGH COURT OF TANZANIA

A. J. KIREKIANO

JUDGE

09/11/2023

COURT: Judgment delivered in chamber in presence of the appellant and Miss Massawe Principal State Attorney for respondent.

Sgd: A. J. KIREKIANO

JUDGE

09/11/2023