IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 43 of 2023

(C/F Criminal Case No. 11 of 2023 in the District Court of Mwanga at Mwanga)

HAMAD ATHUMANI MFINANGA……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGEMENT

Date of Last Order: 09.10.2023
Date of Judgment: 27.11.2023

MONGELLA, J.

The appellant herein was arraigned before the district court of Mwanga at Mwanga for unnatural offence contrary to **section 154 (1) (a) and (2) of the Penal Code** [Cap 16 RE 2022]. The particulars of the offence in the charge were that: on 30.01.2023 at or about 23:00hrs at Vudoi area within Mwanga district in Kilimanjaro region the appellant had carnal knowledge of a boy aged 14 years (the victim or PW1, hereinafter) against the order of nature.

Upon the charge being read to the appellant, he entered a plea of not guilty. The matter proceeded to trial whereby the prosecution paraded 4 witnesses; PW1, the victim; PW2, one, Yesse Theofellas Foya; PW3, one, Rose Elisa Lema and; PW4, WP 3741 SGT Mkunde. The appellant stood for his defence alone as DW1.

The prosecution case was to the effect that: the appellant is the uncle of PW1. The two resided with victim's grandmother and shared a bed. On 30.01.2023 while the victim was asleep, the appellant entered the room, ordered the victim to take off his trousers and he entered his penis into his anus. Thereafter, the appellant warned the victim not to tell anyone of the incident. The following day, while at school, the victim informed PW3 that he had a stomach ache. When she inquired as to what was wrong with him, he disclosed that the appellant had inserted his penis into his anus. PW3 called a male teacher and both questioned the victim who told them that he had been unnaturally carnally known by the appellant and asked them not to tell the appellant as he had threatened to kill him.

PW3 and the other teacher reported the matter to the regional coordinator and after a short time, two police officers; PW4 and one WP Christina, arrived at the school. They met the head teacher and the victim was called. They interrogated the victim whereby he admitted to being sodomized by the appellant and that on the past night the appellant sodomized him.

WP Christina and one Shamsia, a social welfare officer, took the victim to Mwanga Health Centre whereby he was attended by PW2. PW2 examined the victim's anus and found that it was loose, stool and brown fluids came out of it. Together with the attending nurse, he took samples of the bruise and the brown fluid and sent the same to Arusha for DNA testing. He opined that the anus had been penetrated by a blunt object and it seemed the victim had been sodomized many times. He also opined that the bruise had been caused within 24 hours. He filled a PF3 which was admitted as exhibit P1. The police officers commenced investigation and arrested the appellant on the same day.

The trial court found that the prosecution had established a *prima facie* case against the appellant and invited him to enter his defence. The appellant denied sodomising the victim. He also challenged that the DNA test was yet to be brought before the trial court. He averred that the victim (PW1) in her testimony stated to have been sodomised four times by a shepherd and the incident took place on 30.02.2023, but he was sent to the hospital on 31.02.2023.

The trial court found the appellant guilty, convicted and sentenced him to serve life imprisonment. Aggrieved by the conviction and sentence he preferred this appeal on the following grounds:

1. *That the trial Magistrate erred in law and facts to convict and sentence appellant without considering the evidence adduced by defence side.*

2. *That the trial Magistrate erred in law and facts to convict and sentence the appellant while the prosecution side failed to prove the case beyond reasonable doubt.*

3. *That the prosecution did not summon the very essential witnesses to the court should have drawn an adverse inference.* (sic)

4. *That the prosecution failure to prove before the court that who was the sodomiser of the victim after found bruise and brown fluid in his anus which send to Arusha for DNA.* (sic)

5. *That the trial Magistrate erred in law and facts for failure to consider that the victim said he was sodomised by the one known as Mchungi fourth time when cross examined by the appellant.* (sic)

The appeal was argued in writing whereby the appellant was unrepresented while the respondent was represented by Mr. Ramadhani Kajembe, learned state attorney.

Arguing on the 1st ground, the appellant faulted the trial court for not considering his evidence. He claimed to have raised the issue that the prosecution had failed to tender the DNA report while PW2 testified that PW1 discharged stool and brown fluid and had a bruise and took samples of the fluid and the bruise and sent them to Arusha for DNA testing, but no report was tendered to that effect. That, the testimony of PW1 clearly raised doubts as to who exactly had unnaturally carnally known him on the material day as he mentioned one "Mchungi."

The appellant further averred that the prosecution failed to parade a government chemist from Arusha whom he considered a material witness as he was also mentioned during preliminary hearing. He had the view that such witness ought to have admitted a forensic report. He thus prayed for this court to draw an adverse inference on such omission to call the chemist arguing further that the report probably disclosed he was not involved. He moved the court with the case of **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113 and **Aziz Abdallah vs. Republic** [1991] TLR 71. He further challenged the prosecution for not disclosing reasons as why the chemist was not called as a witness.

Jointly submitting on the 2nd, 3rd and 4th grounds. He averred that the trial magistrate did not comply with the requirement of **section 127 (2) of the Evidence Act**, Cap 6 RE 2022. That, the proceedings show that PW1 was not asked preliminary questions to establish whether he knew the duty to speak the truth and that PW1 never

promised to speak the truth and not to tell lies. In that respect, he had the stance that the evidence of PW1 is rendered a nullity and deserves to be expunged from the record. He supported his stance with the case of **Mussa Ramadhani Magae vs. Republic** (Criminal Appeal 545 of 2021) [2023] TZCA 181 TANZLII; **Rajabu William vs. Republic** (Criminal Appeal No.574 of 2019) [2023] TZCA 17557 TANZLII and **Hosea Geofrey Mkamba vs. Republic (**Criminal Appeal No. 37 of 2020) [2023] TZCA 17588 TANZLII.

In reply, Mr. Kajembe first addressed the issue of non-compliance with **Section 127 (2) of the Evidence Act**. He admitted that it was indeed true that the trial court failed to comply with the requirements of the said provision. He cited the case of **Amour Hamis Madulu vs. Republic** (Criminal Appeal 322 of 2021) [2023] TZCA 229 TANZLII in which the Court of Appeal reverted the case of **Issa Salum Nambaluka vs. Republic** (Criminal Appeal 272 of 2018) [2020] TZCA 10 TANZLII and that of **Godfrey Wilson vs. Republic** (Criminal Appeal No, 168 of 2018) [2019] TZCA 109 TANZLII, whereby the Court addressed a similar issue. In support of the appellant's argument, he averred that the trial court ought to have asked PW1 questions to determine whether he understood the nature of oath and recorded the questions and answers put to PW1. He was therefore of the view that the omission warranted the evidence of PW1 to be expunged from the record as the same was illegally recorded.

Mr. Kajembe further submitted that to prove unnatural offence, the prosecution has to establish penetration into the complainant's anus and that the perpetrator of the act was the appellant. In support of his submission, he referred the case of **Onesmo Laurent @ Salikoki vs. Republic**, Criminal Appeal No. 458 of 2018.

Submitted on the evidence to be considered in rape cases, he averred that in sexual offences the best evidence is that of the victim. He referred the case of **Selemani Makumba vs. Republic** [2006] TLR 379 in support of his averment. In conclusion, Mr. Kajembe was of the opinion that, as per the evidence on record, PW1 was the only witness that could prove the offence. Thus, in the absence of another eye witness and in the event such evidence is expunged, no other tangible evidence stands to prove the charge. He therefore prayed that this court quashes the conviction and sentence of the trial court.

After considering the grounds of appeal and the submissions by the parties, for reasons to unfold in due course, I shall first deliberate on the ground involving improper procurement of the victim's testimony. If need arises, I shall address the remaining grounds as well.

The appellant challenged that the trial magistrate failed to comply with the requirement of **section 127 (2) of the Evidence Act** in that, there were no questions put to PW1 to determine whether he understood the nature of oath prior to the trial magistrate taking his

evidence on affirmation. It is on this second issue that Mr. Kajembe conceded to the appeal averring that the evidence of PW1 was not legally recorded.

Before addressing the issue, I find it pertinent to first reproduce the provisions of **section 127 (2) of the Evidence Act**, for ease of reference:

> "**127(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** (supra); **Rajabu William vs. Republic** (supra); **Hamis Madulu vs. Republic** (supra)**; Mathayo Laurance William Mollel vs. Republic** (Criminal Appeal 53 of 2020) [2023] TZCA 52 TANZLII; **Shomari Mohamed Mkwama vs. Republic** (Criminal Appeal No. 606 of 2021) [2022] TZCA 644 TANZLII; **Ramson Peter Ondile vs.**

Republic (Criminal Appeal No. 84 of 2021) [2022] TZCA 608 TANZLII**;** **Omary Salum @Mjusi vs. Republic,** (criminal Appeal No. 125 of 2020) [2022] TZCA 579 TANZLII; **John Mkorongo James vs. Republic** (Criminal Appeal 498 of 2020) [2022] TZCA 111 TANZLII and; **Godfrey Wilson vs. Republic** (supra).

What is discerned from the interpretation of **section 127 (2) of the Evidence Act** is that, a child may give evidence on oath or instead promise to tell the truth. Where a child testifies on oath, the court must first test if such child understands the nature of oath and if so, allow the child to give his/her evidence on oath. In reaching a conclusion that such child understands the nature of oath it is recommended that the presiding magistrate or judge should ask the child questions as to her age, religion and whether the child understands the nature of oath. The requirement to ask the child witness questions on whether he understands the nature of oath is not mandatory when securing a promise to tell the truth, but is mandatory prior to taking evidence of a child witness on oath or affirmation as stated in **Mathayo Laurance William Mollel vs. Republic** (supra):

> "In the case at hand, the child witnesses who are the victims on the counts on which the appellant was convicted, did not give evidence on oath or affirmation. They simply promised to tell only the truth. We think this was quite appropriate in terms of sub-section (2) of section 127 of the Evidence Act reproduced above. **We are unable to agree with the appellant that the trial court ought to have**

> **conducted a test to verify whether the child witnesses knew and understood the meaning of oath or affirmation. In our considered view, that requirement would only be necessary if the child witnesses testified on oath or affirmation.** We respectfully think that if a child of tender age is not to testify on oath or affirmation, a preliminary test on whether he knew and understands the meaning of oath may be dispensed with."

I have observed the trial court proceedings. At page 5 of the proceedings, the testimony of PW1 appears. For ease of reference, I shall hereunder reproduce what was recorded by the trial magistrate before recording PW1's testimony:

> *"PW1: Name Juma Baraka Juma, 14 years, resident of Kiirisi Vudoi, student, Muslim is affirmed and stated as follows"*

It is clear on the record that the trial court let PW1 affirm without first satisfying itself as to whether he understood the nature of oath. It has been emphasized by the Court of Appeal that a child of tender age must first be asked questions to establish whether he or she understands the nature of oath and the same ought to be reflected in the proceedings. Where the testimony of a child of tender age is taken on oath without complying with such requirement the evidence would be of no evidential value. See, **George Lucas Marwa vs. Republic** (Criminal Appeal No.382 of 2019) [2023] TZCA 17424 TANZLII where the Court held:

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

See also, **Shabani Said Likubu vs. Republic** (Criminal Appeal 228 of 2020) [2021] TZCA 251 TANZLII; **Ahamad Salum Hassan @ Chinga vs. Republic** (Criminal Appeal No. 386 of 2021) [2023] TZCA 44 TANZLII. From the record, it is clear that the trial magistrate failed to comply with mandatory requirement of **section 127 (2) of the Evidence Act**. The omission renders the testimony of PW1without evidential value and I hereby discard it.

Having discarded the evidence of PW1, the question now is whether the evidence on record suffices to prove the case against the appellant beyond reasonable doubt. As mentioned by Mr. Kajembe, the offence requires proof of penetration of a male organ into the anus of the victim and that male must be the accused person. It is indeed trite law that the best evidence in

sexual offences is that of the victim. See, **Selemani Makumba** (supra). In the absence of the victim's (PW1) evidence, I find no other tangible evidence to hold the conviction against the appellant. PW3 adduced hearsay evidence with regard to the offence. She stated that the victim told her that he was unnaturally carnally known by the appellant. The evidence of PW4 was on the investigation process from the interrogation of the victim (PW1) at school prior to him being taken to Mwanga Health Center whereby he was tested as well as the arrest of the appellant. His evidence does not directly touch the appellant's commission of the offence.

PW2 testified to have found the victim's anus loose with bruises, brown fluid and feces coming out. He also collected the samples of the brown fluid and the bruise and sent the same to Arusha for DNA testing. The said DNA report was however never produced in court and it is unknown as to what was found in the samples collected. Perhaps with such piece of evidence the prosecution case would have been overwhelming to hold the conviction against the appellant in the absence of the victim's testimony. As matters stand, there is no conclusive evidence connecting the appellant to the crime. It is well settled that the prosecution's duty is two-fold; to prove that the offence was committed and the same was committed by the accused person. This was well stated in **Malik George Ngendakumana vs. Republic** (Criminal Appeal 353 of 2014) [2015] TZCA 295 TANZLII whereby the Court of Appeal held:

> "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."

From the foregoing, I am of the considered view that the case against the appellant was not proved beyond reasonable doubt. I therefore quash the conviction by the trial court and set aside its sentence. I order for the immediate release of the appellant, unless held for some other lawful cause.

Dated and delivered at Moshi on this 27th day of November, 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

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