IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 47 of 2023

(C/F Criminal Case No. 308 of 2022 at the District Court of Moshi at Moshi)

ISAYA ISACK NYANGE…….…… APPELLANT

VERSUS

REPUBLIC…….…. RESPONDENT

JUDGEMENT

Date of Last Order: 13.12.2023
Date of Judgment: 12.02.2024

MONGELLA, J.

The appellant herein was arraigned in the district court of Moshi at Moshi for unnatural offence contrary to **section 154 (1) (a) and (2) of the Penal Code** [Cap 16 R.E. 2022]. The particulars of the offence were that, on 12.08.2022 at Samanga-Marangu area, within Moshi district in Kilimanjaro region, the appellant did have carnal knowledge of a 4 years old boy (the victim or PW1, hereinafter) against the order of nature.

The appellant denied the charge against him rendering the prosecution with the burden to prove its case against him. In doing so, the prosecution paraded five (5) witnesses. PW1, the victim;

PW2, Dr. Sudy Mohamed; PW3, Jennifer Joseph Mamiro; PW4, WP. 10838 D/C Noela and; PW5, Donat Ambrose Mshanga.

The prosecution's case was to the effect that: on 12.08.2022 around 18:00hrs PW1 was sent to his grandmother's house to deliver a hotpot. While on his way, he met the appellant who held his hand and told him that they would go to one Mama Derick's shop so he would buy him biscuits and chewing gum. Upon arriving to the said shop, they did not find the said Mama Derick. The appellant took PW1 to the pit around the shop, undressed his trousers and inserted his male organ into PW1's anus.

PW1 went home where his father (PW5) was. However, he did not tell him of the incidence. Around, 20:00hrs, his mother (PW3) came home and while changing his clothes, she found his trousers with mucus. PW1 narrated to her that the appellant inserted his male organ into his anus. PW3 reported the incidence to Himo Police station on 13.08.2022 whereby the appellant was arrested on the same day. On the same day, PW1 was sent to the hospital with a PF3. He was examined by PW2 who concluded that the anus of PW1 had been penetrated by a blunt object. PW4 was assigned the file to investigate the case whereby she recorded witness statements.

The appellant defended himself as DW1 and did not furnish any further witnesses. He testified that on the material day of 12.08.2022 he attended a funeral and was later told there was a trip to Himo

to which he went and thereafter he then went back to park his motorcycle. The next day he was arrested by the police.

After hearing both parties, the trial court found the appellant guilty of unnatural offence, convicted and sentenced him to serve life imprisonment. Aggrieved, the appellant, while fending for himself, filed the appeal at hand on the following grounds:

1. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the Appellant in total contravention of Section 160 B (a) of the Penal Code, Cap 16 R.E 2022.*

2. *That, the trial court grossly erred both in law and fact in convicting and sentencing the appellant basing on PW1's evidence which was taken in contravention of Section 127 (2) of the evidence Act, Cap 6 R.E 2022.*

3. *That, the learned trial magistrate grossly erred in both law and fact in failing to note the variance between, the charge sheet and the evidence on record pertaining the following areas; (1) the age of the victim (PW1), (ii) the date of the occurrence of the alleged incidence mentioned in the charge was not supported by the Evidence on record. (iii) the place the alleged incidence is said to occur.*

4. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that an unexplained delay by PW1 (the victim) to disclose the details of the alleged ordeal against him when alleged ravished for the first time, casts serious doubts on his (PW1) credibility and cannot attract the confidence of his testimony before the court of Law.*

5. *That, the learned trial magistrate grossly erred both in law and fact in shifting the burden of proof to the Appellant by finding that, the appellant did not call his friend who were together on the alleged fateful day.*

6. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubt against the appellant and to the required standard by the law.*

On the 1st ground, the appellant averred that he had disclosed before the trial court, during his defence presented on 28.11.2022, that he was 18 years old and that was three months after the alleged incident which occurred on 12.08.2022. He contended that according to **section 160 B of the Penal Code**, he was not to be subjected to a cruel sentence as he was of 18 years old and thus a child. He cemented his argument with the case of **Zuberi Mohamed @ Mkapa vs. Republic** (Criminal Appeal 563 of 2020) [2022] TZCA

248 TANZLII. He asked the court to be guided by the decision in the said case and find that he was serving an illegal sentence.

As to the 2nd ground, the appellant argued that since the victim was 5 years old, **section of 127 (4) of the Evidence Act** was to be complied with. He faulted the trial magistrate for failure to comply with the law claiming that she took PW1's evidence on oath prior to conducting an examination to ascertain whether PW1 understood the meaning and nature of oath to justify his reception of his evidence on oath or promise to tell the truth. That, the magistrate only observed that PW1 was intelligent enough to testify. He cemented his argument with the case of **John Mkorongo James vs. Republic** (Criminal Appeal 498 of 2020) [2022] TZCA 11 TANZLII. He further argued that the given promise was incomplete as the child only promised to tell the truth without promising not to tell lies, an argument he supported with the same case of **John Mkorongo** (supra).

With regard to the 3rd ground, he contended that there was variance between the charge and the evidence on record. Firstly, he said that in the charge it was displayed that PW1 was 4 years old while he testified that he was 5 years old. Secondly, that the charge indicated that the incidence took place on 12.08.2022 but the date is not supported by evidence of PW1. He added that the charge indicated that the offence took place at Samanga-Marangu area, but PW3 and PW5, the parents of PW1, testified to be residents of Marangu and there is no certainty that the two refer to one place.

He alleged that the variances clearly show that the case was not proved beyond reasonable doubt. He supported his argument with the case of **Abel Masikiti vs. Republic** (Criminal Appeal 24 of 2015) [2015] TZCA 219 TANZLII. He finalized his submissions by praying that the appeal be found with merit and allowed.

The respondent was represented by Mr. Ramadhani Kajembe, learned state attorney. In reply, Mr. Kajembe noted that the appellant only submitted on 3 grounds of appeal and thus duly responded to the three grounds. He conceded to the appellant's submissions on the 1st ground that indeed the appellant was 18 years old as seen in the charge and in the proceedings. He further argued that as per **section 160B of the Penal Code** the trial court was not supposed to impose a sentence of life imprisonment against the appellant as ruled in the case of **Zuberi Mohamed @ Mkapa vs Republic** (supra).

Mr. Kajembe also conceded to the 2nd ground of appeal averring that the trial magistrate did not comply with the requirements of **section 127 (4) of the Evidence Act** prior to recording the evidence of PW1 who was a child of tender age according to **section 127(4) of the Evidence Act**. Explaining his point further, he contended that the trial magistrate did not ask PW1questions to determine whether he understood the nature of oath and record such questions and answers. He cemented his averment with the case of **Amour Hamis Madulu vs. Republic** (Criminal Appeal 322 of 2021) [2023] TZCA 229

TANZLII and asked for the evidence of PW1 to be expunged from record.

Mr. Kajembe further contended that for unnatural offence to be proved, the prosecution ought to prove penetration of the complainant's anus by the appellant. To that effect, he referred the case of **Onesmo Laurent @ Salikoki vs. Republic** (Criminal Appeal 458 of 2018) [2022] TZCA 594 TANZLII. He contended that for sexual offenses, the best evidence comes from the victim as held in the case of **Selemani Makumba vs. Republic** [2006] TLR 379. He argued further that from the cited case it was also stated that a medical report or evidence of a doctor may help to show that there was sexual intercourse, but it does not prove that there was rape. That, true evidence of rape comes from the victim. He held the view that since the victim was the only eye witness, if his evidence is expunged from the record the subsisting evidence on record is incapable of proving the offense against the appellant. He supported the appellant's prayer for the court to allow the appeal and quash the conviction and sentence of the trial court.

I have considered the submissions of both parties on the argued grounds of appeal and gone through the trial court record. As evident in his submissions, the appellant addressed only the first, second and third grounds of appeal which shows that he intentionally abandoned the rest. In the premises, just like the learned state attorney, I shall address the three grounds, but I prefer to begin with the 3rd and 2nd grounds of appeal.

On the 3rd ground of appeal, the appellant complained that that there was variance between the charge and evidence on: the age of PW1 who was the victim, the date the incidence took place and the place where the incidence occurred.

Regarding the age of the victim, I observed the records and found the charge indeed reads that PW1 was a 4-year-old boy while on proceedings, while giving his evidence, PW1 testified that he was 5 years old. It is well settled that the proof of the age of the victim can come from the victim, his parents, relatives or medical practitioner. This was stated in **Shani Chamwela Suleiman vs. Republic** (Criminal Appeal 481 of 2021) [2022] TZCA 592 TANZLII, that:

> "We wish to restate the settled position of the law as it was done by the first appellate Judge that, the age of the victim in a court of law can be proved by a parent, victim (as the case herein), relative, medical practitioner or, where available, by production of Birth Certificate."

See also; **Iddi Omary vs. Republic** (Criminal Appeal No. 408 of 2021) [2023] TZCA 17699 and; **Mzee Ally Mwinyimkuu @ Babu Seya vs. Republic** (Criminal Appeal 499 of 2017) [2020] TZCA 1776 (both from TANZLII).

In this case, apart from PW1 (the victim), his mother (PW3) and his father (PW5) duly testified on the victim's age. In fact, PW3 described in detail that by the time the incidence occurred the

victim was 4 years old and by the time he was testifying, that is, on 12.10.2022 he was 5 years old. This is seen at page 7 of the typed proceedings whereby PW3 stated:

> "He is 5 years old now. On 12/08/2022 he was 4 years old."

Considering PW3's testimony, I find no merit in the appellant's complaint. Further, the appellant never cross examined PW1 and PW2 as to the age of the victim. Even if such variance was not explained , the same was rather a minor one given that the offence concerned a victim under 18 years of age as per specifications of **Section 154 (2) of the Penal Code** which states;

> "(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."

As seen, the same is for sentencing purposes alone so whether PW1 was 4 or 5 years old, the same sentence would be applied and thus even if such variance existed the appellant could have not been prejudiced.

As to the date of the incidence, the appellant contended that the date on the charge was 12.08.2022, but the same was not supported by PW1. Going through the record, I have observed that PW1 did not state the date the offence took place. However, this is not a variance as alleged by the appellant. The failure to mention this date does not render the same a variation with charge. The prosecution is with duty to prove the offence and where the date

of the offence is specified, the prosecution must prove the same. In **Abel Masikiti** (supra) the Court held:

> "In a number of cases in the past, this court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If it is not done the preferred charge will remain unproved and the accused shall be entitled to an acquittal."

In this case, PW1 reported the incidence on the same date it occurred as testified by PW3, who was the first to learn of the incidence, and PW5, his father. PW1 was then medically examined on 13.08.2022 by PW2 who testified that he had examined PW1 following complaints by a woman accompanying her that he had been sodomized a day earlier. Further, the appellant himself testified as to his alibi on the date of 12.08.2022, and his arrest on 13.08.2022. This is seen at page18 of the typed proceedings whereby he stated:

> "On 12/08/2022 I was at home. My fellow came and asked me to go to the funeral. I therefore went to the funeral. After completing the funeral….
>
> ……On the next day I was surprised by a phone from the chairman who advanced my mother to tell me to escape. I denied the allegations."

Clearly, there was no doubts as to the date the offence took place to the extent of rendering the appellant unable to grasp how to enter his defence.

As to the place the offence took place, I do not see any variance as to cause injustice to the appellant. The charge indicates that the offense took place at Samanga- Marangu area. As much as PW2 testified that they reside at Marangu and PW5 stated their residence to be at Samangu, I find their statements not meaning that Marangu and Samangu are entirely different areas as to raise reasonable doubts on the prosecution evidence. Since the charge reads Marangu-Samangu, it becomes a minor discrepancy for one witness to state "Marangu" and the other to state "Samangu." This ground evidently lacks merit.

Concerning the 2nd ground, both parties contended that the trial magistrate failed to comply with the requirement of **section 127(2) of the Evidence Act** prior to recording the evidence of PW1. As I have established above, PW1 was indeed a 5-year-old boy when testifying and thus a child of tender age as per **section 127 (4) of the Evidence Ac**t which states:

> "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."

Since the question is on whether the trial magistrate complied with the requirement under **Section 127 (2) of the Evidence Act**, I wish first to reproduce the provisions of this section hereunder, for ease of reference.

> "(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."

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** (Supra) and; **Godfrey Wilson vs. Republic** (supra).

What is gathered from the interpretation of **section 127 (2) of the Evidence Act** from the above cited cases, is that; foremost, a child may give evidence on oath or on promise to tell the truth. However, 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. It is recommended that the presiding magistrate or judge should ask the child several questions. A sample of such questions

was offered in **Godfrey Wilson vs. Republic** (supra) which include the age and religion of the child. Such requirement to ask the child witness questions on whether he understands the nature of oath is now not mandatory when securing a promise to tell the truth. However, it is mandatory prior to taking evidence of a child witness on oath or affirmation. This was 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 whereby PW1 appears to have given his evidence at page 7 of the same. I will herein reproduce what is reflected in the proceedings;

> **PW1**: BD (name withheld), 5 years, student, Christian;

> **Court:** The child is of tender age he has been addressed in accordance with section 127 (2) of the Evidence Act and observed to be intelligent enough to testify.
>
> **Sgd: R. OLAMBO - SRM**
> **12/10/2022**
>
> **PW1**: 'I promise I will tell the truth."
>
> **Sgd: R. OLAMBO - SRM**
> **12/10/2022**
>
> **Court**: PW1 sworn and states as follows;

Clearly the record reflects that the trial court did record PW1's initial details and made an observation that he was intelligent enough to testify and thereafter secured PW1's promise to tell the truth which according to the case of **John Mkorongo** (supra) was in direct speech. The absence of a promise not to tell lies did not at all affect the promise as the promise to tell the truth is one not to tell lies. This was stated in the case of **Mathayo Laurance William Mollel vs. Republic** (supra) whereby the Court of Appeal faced a similar issue. It stated:

> "The appellant also argued that the child witnesses' promise was incomplete for promising only to tell the truth and omitted to undertake not to tell lies. 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. The

> tautology in the subsection is, in our opinion, a drafting inadvertency."

As seen from the reproduced records, it seems the trial magistrate also proceeded to take the evidence of the victim on oath. While the same displays the existence of two independent requirements imposed by **section 127 (2) of the Evidence Act**, I am of the considered view that securing the child's promise was the initial intention of the Hon. magistrate, and the same was secured properly. In the premises, the err is curable rendering the 2nd ground unmeritable.

On the 1st ground of appeal, the parties alleged that **section 160 B of the Penal Code** was not adhered to as the appellant was an 18-year-old boy by the time he committed the offence, thus the trial magistrate ought to have granted him a sentence fit for a child. I have observed the record which clearly reflect that when the appellant was arraigned on 31.08.2022 for the offence he committed on 12.08.2022, he was 18 years old. In the premises, the provisions of **section 160 B of the Penal Code** ought to have been complied with. Addressing a similar circumstance, the Court of Appeal in **Zuberi Mohamed @ Mkapa vs. Republic** (supra) stated:

> "As we intimated earlier, the appellant was sentenced thirty (30) years imprisonment despite his age at the time of commission of the offence. We agree with the counsel for both sides that in terms of the above provision, since the appellant was of the age of 18 years at the time of commission of the offence, upon conviction he was supposed to be sentenced to corporal punishment, but that was not the

> case. Failure to observe the dictates of the law in our considered view, occasioned miscarriage of justice on the part the appellant as he was sentenced to more than what he deserved."

In the foregoing, considering that the appellant was unlawfully sentenced, I hereby quash the sentence by the trial court and order for the immediate release of the appellant, unless held for some other lawful cause. However, I sustain the conviction by the trial court. The appeal is thus allowed to such extent.

Dated and delivered at Moshi on this 12th day of February 2024.

X

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