IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA.

CRIMINAL APPEAL NO. 16 OF 2020

(Originating from the Resident Magistrates' Court of Arusha, Criminal Case No. 329 of 2016)

HUSSEIN IDD ..... 1ST APPELLANT

SHABAN HASSAN ..... 2ND APPELLANT

Versus

THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

JUDGMENT

5th July & 20th August, 2021

Masara, J.

Hussein Idd and **Shaban Hassan**, first and second Appellants respectively, stood charged in the Resident Magistrates' Court of Arusha (the trial court) with the offence of unnatural offence, contrary to section 154(1)(a) and (2) of the Penal Code, Cap. 16 [R.E 2002]. It was alleged that on diverse dates of 2016, at Majengo area within the City of Arusha, the Appellants did have carnal knowledge of one Erick Emmanuel, a 9 years old boy, against the order of nature. On 25/10/2016, the trial court convicted all the Appellants of the offence charged and sentenced each to a term of life imprisonment. The Appellants were aggrieved by both the conviction and sentence imposed on them. They have preferred this appeal on the following grounds:

a) *That, the trial Court erred in law and in fact for failure to afford the appellants fair trial;*
b) *That, the trial Court erred in law and in fact when it failed to evaluate the evidence of PW1 the victim as a result it arrived at a wrong decision;*
c) *That, the trial Court erred in law by not complying with section 33 of the CPA, Cap 20 [R.E 2002];*
d) *That, the trial Magistrate erred in law and in fact in convicting he appellants without proof of the offence against them beyond all reasonable doubts as required by law.*

On 9/3/2021, with leave of the Court, the Appellants filed other two additional grounds of appeal. However, the second additional ground is a repetition of the

first ground in the original filed grounds of appeal. Since that ground is a repetition, I shall not reproduce it. The added ground reads as follows:

> *That, the trial Court erred in law and in fact by not complying with the mandatory provision of section 127(2) as amended by section 25 of the Written Laws Misc. Amendment (No. 2) Act No. 4 2016 which came into force on 8/7/2016.*

Basing on the above grounds, the Appellants pray that the appeal be allowed by quashing the conviction, setting aside the sentence and letting all the Appellants at liberty.

The background facts as propounded by the Prosecution leading to this appeal are as follows: Rose Emmanuel (PW2), the victim's mother, was a neighbour to the Appellants. They had rented in the same compound, each living in a separate room. The Appellants lived in the same room. The victim (PW1) was a standard II pupil at Boma Primary School. Her mother used to leave the victim with the Appellants whenever she went for searching their daily bread. It appeared that on 29/7/2016 at 0700am she was preparing the victim for school. When she gave him tooth brush and water for brushing teeth, she noticed that the victim had discharged faeces out of control. While washing the victim, PW2 further noticed that the victim could not sit properly. On the same day, when the victim was on his way to the toilet, he discharged faeces out of control. She took the victim to a dispensary where it was revealed that he had been sodomized. When interrogated by the doctor, the victim replied that: *"Shaban amenifanyia kama Hussein alivyokuwa ananifanyia".*

PW2 took the matter to the police station where she was issued with a PF3. They went to Mount Meru Hospital where it was confirmed that the victim was sodomised. In his unsworn evidence, the victim testified that his mother used to leave him at the Appellants' room. The Appellants used to put what he

referred as "chululu yake ya kukojolea" into his buttocks. The victim further testified that the Appellants warned him that he should not tell anybody.

PW3, the doctor who examined the victim, testified that on 1/8/2016 he examined the victim and filled in the PF3 which was admitted as exhibit P1. On his examination, he found out that there were no external bruises but he had his anal opening healing bruises with loose anal sphincter.

On their defence, the Appellants denied commission of the charged offence. The first Appellant testified that he moved away from his former residence on 6/7/2016, shifting to Kwamromboo. He fortified that they were living at Majengo in the same compound with the victim's mother. He was sick, and on 31/7/2016 he was arrested by the victim's father. He admitted that he knows the victim as they were tenants in the same compound. He also stated that he had conflicts with the victim's mother. On the other hand, the second Appellant's testimony was to the effect that he was arrested on 16/7/2016 on the allegation of sodomising the victim. He maintained that he has never had quarrels with the victim's mother. Mustapha Juma (DW3), testified that he lived with both Appellants and the victim's mother at Majengo. On 6/7/2016, the first Appellant moved out of the house. He was left with the second Appellant. DW3 heard from the victim and his parents that the Appellants had sodomised him. The victim was hospitalized, and the Appellants were arrested. DW3 was involved in looking for the first Appellant and upon his arrest he was taken to the police. He added that the victim was not sodomised as all the tests taken gave negative results.

After hearing evidence from both sides, the trial magistrate was satisfied that the prosecution had proved the charge on the required standard. As pointed out earlier, the Appellants were convicted and sentenced as charged. They

preferred their first appeal in this Court vide Criminal Appeal No. 83 of 2019, which unfortunately was struck out on 19/9/2019 for being filed out of time. They filed Misc. Criminal Application No. 77 of 2019, seeking extension of time to file a Notice of Appeal. On 27/2/2020 they were granted 21 days to file both the Notice and appeal. On 29/2/2020 they filed Notice of Appeal and on 12/3/2020 they filed the instant appeal.

At the hearing, the Appellants appeared in person, unrepresented, while the Republic was represented by Ms Tusaje Samwel, learned State Attorney. The appeal was argued *viva voce*. The

The first Appellant submitted on his own behalf and on behalf of the second Appellant. On the first ground of appeal, the Appellants submitted that they contest the trial court decision as they were not allowed to cross-examine each other, referring to pages 18 of the proceedings. He insisted that they were supposed to be allowed to cross examine each other. He cited the decisions of ***Albanus Aloyce and Another Vs. Republic***, Criminal Appeal No. 283 of 2015 and ***Gift Mariki and Others Vs. Republic***, Criminal Appeal No. 289 of 2015 (both unreported) to augment his submisssions.

Submitting on the second ground of appeal, the Appellants contend that the trial court did not properly scrutinize the evidence of PW1 (the victim). In their view, PW1 is not a trustful witness because it was not possible for such a small boy to be sodomised and remain mum without telling his mother. That the victim's evidence was doubtful because he did not say whether the Appellants threatened him but that they warned him not to inform anyone. According to the Appellants, this cannot be the reason for the victim not to tell his mother.

Regarding the third ground of appeal, the Appellants complained that they did not sign the PH records. It was only the second Appellant who signed, but the first Appellant did not.

On the fourth ground of appeal, the Appellants submitted that both Appellants were taken to court outside the prescribed time. That the first Appellant was arrested on 31/7/2016 but he was taken to court on 12/8/2016. On his part, the second Appellant was arrested on 16/7/2016, but he was charged on 12/8/2016. The prosecution did not explain why it took such a long time for the Appellants to be charged.

Submitting on the additional ground of appeal, the Appellants asserted that the evidence of the victim was wrongly admitted as he did not promise to say the truth before testifying. In their view, this anomaly contravened section 127(2) of the Evidence Act as amended in 2016. They prayed that the evidence of PW1 be expunged from the record. The Appellants added that the PF3 (Exhibit P1) was not read after it was admitted in court. Further, the doctor who tendered it in court did not explain its contents to the Appellants. That, the doctor failed to explain the blunt object that led to bruises and that he also failed to explain the object used in examining the victim. The Appellants prayed to be acquitted based on the above grounds.

After the Appellants had finished their submissions, the learned State Attorney supported the appeal on the following grounds: First, that the charge sheet is vague as there were no specific dates and month mentioned when the offence occurred. That, it was therefore difficult for the Appellants to defend themselves or raise a defence of *alibi*.

Second, the learned State Attorney admitted that the trial magistrate erred in conducting a voire dire examination instead of adhering to the requirements of Section 127(2) of the Evidence Act. That on 30/8/2016 when PW1 testified, Act No. 4 of 2016 had come into force on July, 2016. Another reason pointed out by the learned State Attorney was that the Appellants were denied the right to cross examine each other. In addition to that the Appellants were sentenced to life imprisonment but the age of 9 years (victim's age) was not proved. The learned State Attorney prayed for the acquittal of the Appellants.

Having considered the grounds of appeal and the oral submissions of both sides, the main issue for consideration is whether the Appellants were rightly convicted.

The Appellants' first ground hinges on the complaint that their right to cross examine each other was abrogated by the trial court. As earlier stated, this was conceded by the learned State Attorney. A close examination of the trial court record reveals that while testifying, the Appellants were not afforded the right to cross examine each other. Where two accused persons are tried together in the same offence, and especially where they seem to incriminate each other, the court must accord each accused the right to cross examine the other so as to test the veracity and truthfulness of the co-accused.

In the appeal under consideration, the Appellants were denied that right. Moreover, DW3 testified that he was living with the Appellants and that he was present when the victim was narrating on how he was sodomised and that he was involved in ensuring the arrest of the Appellants. This witness was also not cross examined by the Appellants. Such omission on the part of the court is a serious non-direction, which entails that the Appellants were not accorded fair trial as they suggest. Fair trial is a cardinal principle of our legal system. As long

as the Appellants were denied the right to cross examine each other and to cross examine their witness, they were denied the right to be heard. The rationale of affording accused persons the right to cross examine each other was held sacrosanct by the Court of Appeal in ***Albanus Aloyce and Another Vs. Republic***, (supra), the case cited by the Appellants, where it was held:

> *"The proceedings show that after each accused had testified his co-accused were not given an opportunity to put questions to him.* ***An accused person who testifies becomes a witness and if there are other persons who are charged along with him they have a right, we believe, to put questions to him/her. This is essential because there may be times when an accused may give an incriminatory evidence against his/her co-accused(s) in which case a denial of the right of cross-examination by the concerned accused could result in a miscarriage of justice****. Judicial officers are enjoined to take heed of this."* (Emphasis added)

The above position was restated in the case of ***Gift Mariki and Others Vs. Republic***, (supra), a case also cited to me by the Appellants. In that case it was observed:

> *As clearly depicted by the record,* ***first,*** *the appellants were denied the right to cross-examine each other to test the veracity of the testimony or shake the credibility of the witness, adverse or otherwise. Second, the omission to allow the 1st, 2nd, and 3rd appellant to cross examine each other meant that they were deprived of their right to put before the court their full answer and defence to the charge.* ***Third****, even with that serious non-direction, which also went undetected at the High Court, the trial court proceeded to erroneously consider that the appellant had properly made their defence according to law and that each of the appellants' defence case was complete. So long as the appellants were denied their basic and essential right to cross-examination and to a fair trial, their defence to the charge could not have been fully accorded, heard or be complete."*

I associate myself with the above position of the law. In the case at hand, since the Appellants were denied the right to cross examine each other, they were therefore not accorded the right to a fair trial. For the above reasons, the first ground has merits.

The next ground which was also conceded by Ms Tusaje was on the conduct of *voire dire* test by the trial court. She admitted that *voire dire* test was not a mandatory requirement from July, 2016 when Act No. 4 of 2016, which amended section 127 of the Evidence Act, became operational. The only requirement was on PW1, who was a child of tender age, to promise to tell the truth. I entirely agree with her. After amendment of the Evidence Act, before taking the evidence of a child of tender age the procedure is as provided under section 127(2) of the Evidence Act, Cap. 6 [R.E 2019], thus:

> *"(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."*

As to the procedure, it was elaborated by the Court of Appeal in the case of ***Issa Salum Nambaluka Vs. Republic***, Criminal Appeal No. 272 of 2018, while making reference to its previous decision in ***Geoffrey Wilson Vs. Republic***, Criminal Appeal No. 168 of 2018 (both unreported), where it was observed:

> *"We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions/ which may not be exhaustive depending on the circumstances of the case as follows:*
> *1. The age of the child.*
> *2. The religion which the child professes and whether he/she understands the nature of oath.*
> *3. Whether or not the child promises to tell the truth and not to tell lies."*

In the record of the trial court, before taking the evidence of PW1 who was said to be 9 years old, the trial magistrate in ascertaining whether the victim understood the duty of telling the truth, asked him various questions. I am interested in the last question asked by the trial magistrate. The record shows as follows:

> *"Qn: What are the consequences of telling lies.*
> *Answer: It is a sin against God, God will punish by fire the one telling lies.*
> *Court (findings):* ***The child posses sufficient intelligence to testify and understand the duty of speaking the truth"*** (Emphasis added)

Surprisingly, after such response, PW1 gave unsworn evidence. That was an irregularity whim leads to nullification of the evidence of PW1. It was expected that after the trial magistrate was satisfied that PW1 possess sufficient intelligence to testify and that he understood the duty of speaking the truth, she ought to have testified on oath. The error committed by the trial magistrate is a serious one. As correctly submitted by the Appellants, the evidence of the victim was improperly taken. I therefore expunge PW1's evidence from the Court record for being taken in contravention of the law.

Having expunged the evidence of PW1 from the record, there remains no cogent evidence that could have been relied on to ground the Appellants' conviction. This being a sexual offence, the best evidence is that of the victim. See ***Selemani Makumba Vs. Republic*** [2006] TLR 379. The evidence of PW2 and PW3 flow from what was narrated to them by the victim. It remains to be hearsay which has no evidentially value. This ground alone suffice to dispose the appeal before me. However, for completeness, I find it prudent to deal with two other complaints raised.

The learned State Attorney pointed out that the charge against the Appellants was vague. The charge was silent about the date and month the incidents occurred, which was difficult for the Appellants to prepare their defence. It was also not shown why the Appellants were charged jointly. PW3 testified that the sodomy took place 2-3 days before. That wa, however, was not proved. Considering the defence of *alibi*, which the first Appellant purported to rely on, it was difficulty for him to raise such a defence since the charge was silent on the day and month that the incident occurred. I say so because the defence evidence was that the first Appellant had shifted the residence on 6/7/2016, while as I said, PW3 testified that the incident occurred three days from 1/8/2016 when he examined the victim.

The other complaint, was on the failure to prove the age of the victim. This complaint is genuine. There was no evidence led by the prosecution to prove the age of the victim, so as to properly appreciate the charge and the sentence imposed on the Appellants. I hold this view because, the Appellants were charged under section 154(2), which is a sodomy against a child of tender age, whose sentence is mandatorily life imprisonment. The prosecution ought to have led evidence proving that PW1 was 9 years old as shown on the charge.

Examining all the above pointed out irregularities, it is the finding of this Court that the Appellants' conviction was improperly arrived at. The prosecution evidence did not prove the offence against the Appellants on the required standards. This leads me to the conclusion that the Appellants were not accorded a fair trial as anchored in ***Musa Mwaikunda Vs. Republic*** [2006] T.L.R. 387. The above highlighted irregularities suffice to dispose the appeal. I find no compelling reasons to deal with the rest of the grounds.

In the event, the appeal is hereby allowed in its entirety. The Appellants' conviction is hereby quashed and sentence set aside. I hereby order the release of both Appellants from prison, unless they are otherwise lawfully held.

Order accordingly.

THE HIGH COURT OF TANZANIA

Y. B. Masara
JUDGE
20th August, 2021.