IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO. 118 OF 2022

BETWEEN

KEKENWA S/O KUDIDA NHORERA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Kigamboni at Kigamboni before I. J. Nyantori, RM)

JUDGMENT

Date of Last order 06/10/2022
Date of Judgment 26/10/2022

A. Z. BADE, J

The appellant, Kekenwa s/o Kudida Nhorera was charged with the offence of three counts of grave sexual abuse c/s 138 C (2) (b) of the Penal Code, by the District Court of Kigamboni sitting at Kinondoni. After the full trial he was found guilty and duly convicted and sentenced to serve twenty (20) years imprisonment for each count, with all the sentences being ordered to run concurrently. He was further ordered to pay compensation of Tshs 100,000/- to each of the victim of the offence.

Being aggrieved and dissatisfied with that decision he now appeals to this Court against the whole of the judgement, conviction and sentences on the following 9 grounds namely:

1. That the trial magistrate erred in law and fact in believing the appellant's guilty of the crime despite the fact that there is doubt on where the crime was allegedly committed. PW 1 said Vijibweni, PW 3 Said at "Kwa Mchina" while PW 4 said at NAFCO Gezaulole. The doubt must be resolved in favour of the appellant.
2. That the trial magistrate erred in law and fact when he proceeds to convict and sentence the appellant while knowing that the Prosecution had failed to prove the charge laid against the appellant.
3. That the trial magistrate erred in law and fact for failure to properly evaluate the evidence and see that the case was fabricated. Consequently, he proceeds to convict and sentence the appellant who did not commit any crime by basing on concocted evidence.
4. That the trial magistrate erred in law and fact as he failed to direct his learned mind on the material contradiction, inconsistencies and shortcomings in the evidence adduced by PW1, PW2, PW3 and PW4 which raise doubt on the truthfulness of their story and cast doubt on the appellant's guilt.
5. That the learned trial magistrate erred in law and fact in believing that the appellant was properly identified despite the fact that there was no proper folio identification parade, as the identification evidence of PW1, PW2, and PW3 against the appellant was weak, inadequate and below the legal standard, it could not sustain a conviction.
6. That the trial magistrate erred in law and fact by convicting the appellant relying on uncredible, unreliable suspect, contradictory evidence from prosecution.

7. That the honorable magistrate erred in law and fact in believing the guilt of the appellant despite failure by prosecution to call material witnesses for undisclosed reasons e.g. the said mother of Patrick (PW3) and the Mother of Eveline (PW1) and Edwin (PW2)
8. That the learned trial magistrate grossly misdirected himself in convicting the appellant by basing on Exhibit P1(the alleged cautioned statement of the appellant) despite that exhibit P1 was a fraud. First Prosecution claimed that the appellant admitted to have sodomised the children through exhibit P1 while there was never a sodomy. Thus, having found that there was never a sodomy then the alleged admission through exhibit P1 is therefore doubtful and is highly unsafe to base on such doubtful alleged admission to convict the appellant.
9. That the trial magistrate erred in convicting the appellant as there was nò credible evidence to implicate the appellant in crime.

The facts of this case can be briefly reproduced that the appellant was said to have met the three victims of the offence who were twin brother and sister with their friend, who were playing around climbing mango tree and getting down mangoes. The accused came by and told the children that they are trespassing and taking his father's mangoes without permission, and as such they should choose whether they should be taken to the police or be beaten up. They picked the option to be taken to the police but the accused held them and took them to the bush, where he ordered one of the victim (the girl) to undress, and started attacking this child by carnally knowing her against the order of nature. He then ordered the other one (a boy) to also undress, he carnally knew him too, and used that trouser to tie down the

both of them while dealing with the third child so they will not run away. After he was done with them, he ordered them to dry up their tears, and go back home using the back roads so that people will not see them. One of the twin immediately informed their father, who took them to the police station and on the next day to the hospital.

As fate will have it, three weeks later on 24th November one Sunday morning, one of the child victim spotted the accused person doing his business on a near their home shop, and raised an alarm that here was the person who had abused them three weeks back. The fathers took it upon themselves to inform the police who instructed them to apprehend and arrest the accused. All the other children when they eventually were taken to the police station visually confirmed that the accused person is their assailant.

In essence his appeal is hinged on two issues; that the prosecution has failed to prove its case beyond reasonable doubt which is the standard set in criminal cases; and secondly that failure to observe the provisions of the law in taking evidence of children of tender years is fatal and prejudicial to him.

He thus prayed for his appeal to be allowed on merit, quash the conviction and set aside the sentence and leave him free at liberty. He also prayed to be present at the hearing of the appeal.

To support his appeal the appellant filed his written submission and argued his case as recorded hereon. As it happened, the respondent did not wish to submit in response, even though they made it clear that they do support the conviction and sentencing of the appellant.

To start with , he argues that section 127 (2) of the Tanzania Evidence Act Cap 6 RE 2019 was not complied with because before taking discredited evidence of PW1 a child of 10 years old, PW2 a child of tender age 10 years old as well as PW3 a child tender age 8 years old, no examination was conducted by the trial court on PW1, PW2 and PW3 to test their competence on whether they knew the meaning and nature of an oath, that the trial court jumped to the conclusion that they have promised to tell the truth, without the meaning and nature of an oath, as explained in the case of **Godfrey Wilson vs Republic, Criminal Appeal No. 168 Of 2018** [unreported].

That the discredited testimonies of PW1, PW2 and PW3 was taken in violation of section 127 (2) of the Evidence Act, to firstly be examined to test their competence and know whether they understand the meaning and nature of an oath before it is concluded that their evidence to be recorded after giving a promise to the court to tell the truth and not to tell lies and if they are capable of comprehending questions put to them and also if they have given rational answers to the question put to them.

It cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify or that they do not understand the meaning and nature of an oath and therefore lies. He reasoned further that this is the reason why children of tender ages who are brought before the court as witnesses are required to be examined first, albert in brief, to know whether they understand the meaning and nature of an oath before it is concluded that they can give their evidence on the

promise to the court to tell the truth and not tell lies as per section 127 (2) of the Evidence Act.

He further urge that the omission or failure by the trial court to have first examined PW1, PW2 and PW3 to test their competence and know if they understood the meaning and nature of an oath before jumping to the conclusion that PW1, PW2 and PW3 would give unsworn evidence and it were in form of an indirect or reported speech instead of a direct speech, which is fatal and renders the discredited testimonies valueless.

He further urge that even section 127 (6) of the evidence Act cannot be applied in isolation from section 127 (2) of the same Act. He reasoned that since the whole testimonies of PW1, PW2 and PW3 contradicted themselves and their story is tainted with contradictions and inconsistencies which raise doubt on the truthfulness of their stories, casting doubt on the appellant's guilt.

I would like to determine this ground of appeal as argued by the appellant, and while at that I shall be determining ground 1, 2, 4 and 5 which I believe shall resolve this appeal as the other grounds shall be naturally incorporated into the ones determined.

Looking at the proceedings pages 9-10; 12 – 13; and 16, the trial court was compliant to section 127(2) of the Tanzania Evidence Act particularly as guided through the Court of Appeal in **Godson Wilson vs Republic (supra)**. I take the liberty to hereby reproduce verbatim what the trial court recorded.

PW2 recording as a sample in p 13 of the typed proceedings had....

"CHILD-My name is Edwin

COURT-How old are you

PW2-CHILD- I am ten years old.

COURT- Which standard are you.

PW2 CHILD -I am in standard five.

COURT- Do you know the different between telling the truth and lies.

PW2 CHILD- Telling truth is good and telling lies is very bad.

COURT- Do promise to tell the truth

PW2 CHILD- I promise to tell the truth.

COURT - PW2 Promise to tell the truth."

The trial court did this questioning to all the three children who were the victims of the offence. This is not far away from what the Court of Appeal has guided in the application of the law in taking of evidence of children of tender years.

In John Mkorongo James vs Republic; Criminal Appeal no 49 of 2020 which quoted with approval the case of **Godfrey Wilson vs Republic, Criminal Appeal no 168 of 2018** (unreported) necessarily requires the trial court

".... To require PW1 *(the child witness)* to promise whether or not she would tell the truth and not lies. We say so because, section 127(2) as amended imperatively require a child of tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. **This is a condition precedent before reception of the evidence of child of tender age.**

The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of 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 profess and whether he/she understands the nature of oath
3. Whether or not the child promises to tell the truth and not tell lies. Thereafter, upon making the promise, such promises must be recorded before the evidence is taken (emphasis mine)

On the basis of the foregoing record of the proceedings it is obvious that the trial court can not be faulted in the way the evidence of the children victims of the offence were taken. I find this ground of appeal without any merit and so I dismiss it.

I will now turn on the ground 5 of appeal on how the accused was identified. The appellant argue that it is not clear in evidence how PW1, PW2 and PW3 came to know the appellant. Neither did they give any graphic description on the basis of which they identified or recognized the appellant as fact or morphological appearance, color or physique and attire. He argues that they did not do so to the persons who gave the description and purport to identify the accused or by person or persons to whom the description was given.

This ground of appeal captured my attention and I have gleaned the whole record of proceedings and have not found anywhere where the accused is positively identified through an identification parade or any other way as

required by the law so to speak. Sadly, we have victims of sexual offences but it is quite unsettling to realize that the person who is accused of the offence might not be the culprit because there were no efforts to positively identify this person.

The victims of the offence who are children were the only eye witnesses, and they never met this accused person before the material date where the offence is said to have been committed, which means they were absolute strangers. The prosecution case is marred with doubts as it is very possible that this is a mistaken identity. All the prosecution witnesses were thronged on the identification by the three victims of the offence three weeks down the line on the by chance recognition of the accused person. I do not find that to be positive or watertight identification of the accused. A line up by the prosecution of persons resembling the accused in terms of his physique, skin color, height, hairline and things of such nature would have produced better result in settling the doubt that the children victim of the offence have positively picked their culprit. Prudence will require that eye-witness identification evidence is more watertight.

To start with, evidence of visual identification is already of the weakest kind, therefore just bare assertions of identification of a culprit/ suspect would not suffice as a ground of conviction unless it is accompanied by a detail description of the person allegedly identified. It is imprudent for the trial court to convict the accused who was not arrested at the scene of the crime, on simple bare assertions of the children witnesses that they recognized the accused.

The law is well settled on the import of visual identification and conditions for relying upon it and for a court to find conviction. Decisions of the Court have held that such evidence should not be relied upon unless the court is satisfied that the evidence is watertight and all possibilities of mistaken identity are eliminated (See: **Waziri Amani vs Republic, Criminal Appeal no 55 of 1979, Emmanuel Luka and Others vs Republic, Criminal Appeal No. 325 of 2010 and Omari Iddi Mbezi and 3 Others vs Republic, Criminal Appeal No. 227 of 2009 and Taiko Lengei vs Republic, Criminal Appeal No. 131 of 2014** (unreported) In the case of **Waziri Amani vs Republic** (supra), The Court of Appeal laid down some guidelines for consideration in establishing whether the evidence of identification is impeccable. These include; the time the culprit was under the witness observation, witness's proximity to the culprit when the observation was made, the duration the offence was committed, if the offence was committed if in the night time, sufficiency of the lighting to facilitate positive identification, **whether the witness knew or had seen the culprit before the incident and description of the culprit** (emphasis mine). Furthermore, mention of the culprit's peculiar features to the next person the witness comes across after the incident further solidifies the evidence on identification of the culprit, especially when repeated at his first report to the police officer who interrogates him.

It is trite law that if there is any doubt in the prosecution 's case, the same should be resolved in favour of the accused. This was the resolve of the

Court of Appeal of Tanzania in the case of **Zakaria Japhet v. Jumanne & 2 Others vs Republic, Criminal Appeal No. 37 of 2003** (unreported).

For that reason, I am well convinced that the identification of the accused person is doubtful. I find this ground to be of merit and thus I allow it.

The other ground of appeal is the fact that the prosecution deliberately fails to call a material witnesses who are within reach without apparent reasons, the court may presume or infer that the evidence which apparent would be one to clear doubts for the court to reach who have a burden to prove beyond reasonable doubt that the accused committed the offence, the accused only needs to cast doubts and that the prosecution will have to struggle to clear it vide as was in the case of **Lazaro Kalongo vs The Republic, Criminal Appeal No. 348 Of 2008** [unreported] adopted the reasoning in **Aziz Abdallah vs The Republic [1991] TLR 71.**

The general and well-known rules is that the prosecution is under prima facie

duty to call those witnesses who from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reasons being shown the court may draw an inference adverse to the prosecution.

That, a court may be invited to draw a permissible adverse inference against the prosecution case crucial or material witness i.e., the said mother of Patrick (PW3) and mother of Eveline PW1 and Edwin (PW2) who are within reach and who could have testified against a critical or decisive aspects of its case are withheld without sufficient reasons, vide in the case of **Aziza**

Abdallah vs Republic [1991] 71; Abdallah Kondo vs Republic, Criminal Appeal No. 322 Of 2015; and Danson Athanaz vs Republic, Criminal Appeal No. 285 of 2015 [all of which are unreported].

On this ground that the prosecution should have called the so called material witnesses but failed so to do, I am inclined to disagree as I firmly hold that the prosecution are not bound to call any number of witnesses if they do not think that they will affect their case one way or another. Its their discretion and they can not be faulted if they choose not to call these witnesses with whom they would have added on the line up of the witnesses unnecessarily. According to Tanzania Evidence Act, Cap 6 RE 2002 I take note of the right guidance of the provision of section 143, that no particular number of witnesses is required to be called by the prosecution to prove its case, the requirement being to prove a case beyond reasonable doubt. I find no merit on that ground.

On the ground regarding the admissibility of the cautioned statement exhibit P1 at p 32, he argues that was an error for the learned trial magistrate to convict the appellant relying on exhibit P1 that was recorded illegally by PW6 after the lapse of prescribed period by law of four hours stipulated under section 50 (1) (a) of the Criminal Procedure Act Cap 20 RE 2019.

He reasoned that there were no justifiable reasons to take the statement out of the prescribed time to justify the extensions as provided for under section 51(1) (a) of the Criminal Procedure Act Cap 20 RE 2019, as explained in the case of **Omary Said @Habibu Omary and another vs Republic, Criminal Appeal No. 302 of 2014** [unreported] in support of the

proposition that section 50 and 51 of the Criminal Procedure Act Cap 20 RE 2019 are meant to safeguard justice and not otherwise. Failure to do so, shows laxity on the part of the investigation, arguing that while there was a chance for the prosecution to apply for extension of time under section 51 (1) (a) they did not utilize it. The cautioned statement was illegally obtained and deserves to be expunged from the record.

While this is true but I will not proceed to determine this ground of appeal as it would have been carried by the cross cutting view as I hold that the prosecution has failed to prove the case against the appellant beyond reasonable doubt. The burden to prove that an offence was committed, and it was committed by the appellant is important in proving an offence; these two elements rested solely upon the prosecution. This is the position in **Jonas Nkize v R (1992) TLR 213.** See also Court of Appeal in the case of **Malik George Ngenda Kumuna vs Republic, Criminal Appeal No. 535 of 2014 (**Unreported**),** Apart from leading evidence in proof that the victims were unlawfully carnally known against the order of nature, the prosecution was duty bound to lead evidence and establish, beyond reasonable doubt, that the appellant is the one who committed the offence. In my considered opinion, none of these duties were fulfilled satisfactorily by the prosecution, and as such I allow the appeal.

On the final analysis, I allow the appeal, quash the conviction and set aside the sentence on the appellant. The appellant **Kekenwa s/o Kudida Nhorera** is set free unless he is otherwise lawfully held. It is so ordered.

Dated at Dar es Salaam this 26th day of October 2022

A. Z. Bade
Judge
26/10/22

Court: Judgment delivered by Hon Nyembele DR in the presence of the Appellant, and the learned State Attorney. Right of Appeal explained to parties.

Signed

DR
26/10/2022.