IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 161 OF 2022

(C/F Criminal Case No. 328 of 2020, Resident Magistrates' Court of Arusha at Arusha)

LABANI SAMWEL ..... APPELLANT

Versus

THE D.P.P ..... RESPONDENT

JUDGMENT

6th June & 07th August, 2023

TIGANGA, J.

The appellant was arraigned before the Resident Magistrates' Court of Arusha at Arusha (trial court) in Criminal Case No. 328 of 2020 charged with the offence of unnatural offence contrary to section 154 (1)(a) of the **Penal Code**, Cap 16 R.E. 2019, now R.E 2022.

According to the prosecution evidence, on 20th September, 2020, at Baraa area within Arusha District in Arusha Region, the appellant had carnal knowledge with **EE** (name withheld) a boy aged eleven years against the order of nature. The unfortunate ordeal came to light when **EE** continually skipped school and the teachers reported it to his parents. His mother, PW1 also noted such behaviour, and **EE** was not cooperating when asked. PW1 also noted that her son wasn't eating properly. She decided to take him to

the Police Station, it is where he opened up to the Police Officers, PW2, that Mzee Labani, the appellant used to take him from school to a room in a place where he worked as a security guard. While there, he undresses himself and the victim, apply oil to the victim's anus, and inserted his "chululu makalioni". Following such revelation, the victim was taken to Mount Meru Hospital where he was examined and the result showed that, he was indeed penetrated against the order of nature.

In his defence, the appellant told the trial court that, he was just invaded by unknown people, assaulted with bush knives, and arrested for this offence. He denied having committed any sexual offence to the victim, he rather claimed that, the victim mistakenly confused him with someone else. In the end, the trial court was satisfied that, the case against the appellant was proved at the required standard, found the appellant guilty, convicted, and sentenced him to life imprisonment. Aggrieved by the decision, he preferred this appeal on the following eight (8) grounds;

1. That, the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant on the charge he did not plead, that is section 154 (1) (a) and (2) of the Penal Code, because the charge which the appellant pleaded was laid under section 154 (1) (a) of the

Penal Code Cap 16 (R.E 2019) and not 154 (1) (a) and (2) of the Penal Code of which he was convicted.

2. That, the trial Magistrate erred in fact in convicting and sentencing the appellant on a seriously defective charge (the punishment provision was not cited in the charge sheet, the omission which is prejudiced to the appellant).
3. That, the trial Magistrate erred in law and fact in convicting the appellant by relying on evidence of PW1 and PW2 whose evidence was received in contravention of section 198 (1) of C.P.A [Cap 20 R.E 2019].
4. That, the trial Magistrate erred in law and fact in holding that the evidence of PW1 and PW2 corroborated the evidence of the Victim while the same evidence of PW1 and PW2 was unsworn which by itself needed corroboration as a result reached at a wrong decision.
5. That, the trial Magistrate erred in law and fact in entering a conviction against the appellant which was grounded on weak, unreliable, contradictory, and incredible evidence from prosecution witnesses.

6. That, the trial magistrate erred in law and fact in convicting the appellant while there was a variance between the charge sheet and the prosecution evidence adduced.
7. That the case against the appellant was not proved beyond reasonable doubt.
8. That, the appellant's defence was not considered by the trial court.

During the hearing of the appeal which was done by way of written submissions, the appellant was represented by Mr. Nelson Merinyo, learned counsel while the respondent was represented by Ms. Witness Mhosole, learned State Attorney.

Supporting the appeal, Mr. Merinyo started by submitting on the 3rd and 4th grounds of appeal jointly that, the evidence of PW1 and PW2 be expunged from the record because it was taken without them being sworn. He averred that, without such evidence the whole prosecution case crumbles because the trial court used it to lay the foundation for convicting the appellant and that, PW3 and PW4's testimonies cannot stand on their own without PW1 and PW2's testimonies.

He argued that it was PW1 and PW2 who told the court that, the appellant was identified hence without their testimonies, the appellant's

identification remains wanting. Also, PW3 and PW4 do not explain the day and place where the ordeal happened and why it took so long for the victim, PW4, to report the matter, thus, without the testimonies of PW1 and PW2 other prosecution evidence fails, as a result of poor investigation as held by the Court of Appeal in the case of **Athuman Juma vs. The Republic**, Criminal Appeal No. 2 of 2022.

It was Mr. Merinyo's further submission that, the trial court failed to consider the appellant's testimony that, he was mistakenly identified by the victim which is a fatal irregularity as held in the case of **Fred John vs. The Republic,** Criminal Appeal No. 17 of 2018.

Submitting on the 5th and 7th grounds of appeal the learned counsel averred that, PW3 told the court that, the victim had bruises in his anus, but the PF3, exhibit P1, does not show such fact. Further to that, PW4's testimony does not show whether he felt pain in any of his encounters with the appellant which implies doubt as to whether he was never penetrated against the order of nature.

On the 6th and 8th grounds of appeal, Mr. Merinyo submitted that the weakness of the prosecution case can be traced from the evidence of PW1 and PW2 and as explained in the 3rd and 4th grounds of appeal. The

prosecution failed to prove the case beyond reasonable doubt as required by the law.

On the 1st and 2nd grounds, learned counsel referred the court to the case of **Godfrey Simon & Another vs. The Republic**, Criminal Appeal No. 296 of 2018 which underscored the importance of citing the charge properly. He prayed that, this appeal be allowed.

In reply, Ms. Witness Mhosole, submitted on the 1st and 2nd grounds that, the appellant pleaded only to a charge of unnatural offence contrary to section (154) (1) (a) of the Penal Code. That, although the offence was not read together without the sentencing section i.e. section 154 (2) of the Penal Code, the same did not prejudice the appellant. Further, such omission can be cured by section 388 of the Criminal Procedure Act, [Cap, 20 R.E. 2022] as the omission is not fatal as held in the case of **Halfan Ndubashe vs. The Republic**, Criminal Appeal No. 493 of 2017 CAT at Tabora.

On the 3rd and 4th grounds of appeal, it was Ms. Mhosole's submission that, the evidence adduced by both PW1 and PW2 was from a sworn testimony. That, after receiving the copy of the judgment and proceedings, the prosecution perused the original trial court's record and found that PW1's sworn testimony was taken on 21st September, 2021 and that of PW2 was

taken on 7th December, 2021, all by Hon. S. Mshaha PRM. Hence, they cannot be expunged as section 198 (1) of the CPA was complied with.

On the 5th ground of appeal, the learned state attorney submitted that, the prosecution evidence was strong enough to warrant the appellant's conviction. According to him, PW1 told the court that, she took the victim to the police station where he narrated how he was sodomized to PW2 and PW3 who took the victim to the hospital where it was confirmed that he was indeed penetrated. She argued that, despite other witnesses, the best evidence is that of the victim which is enough to hold conviction as held in the case of **Wilson Elisa @Kiunga vs. The Republic**, Criminal Appeal No. 449 of 2018, CAT at Arusha (unreported).

As to the 6th ground of appeal, she submitted that, there was no variation between the charge sheet and the evidence adduced at the trial court, and if there was any variance, the appellant had room to cross-examine the witnesses but he did not do so the omission which makes it an afterthought. She argued that, the failure of the appellant to cross-examine the witnesses implies that, he conceded to the facts adduced as held in the case of **Nelson Onyango vs. Republic**, Criminal Appeal No. 49 of 2017.

On the 7th ground of appeal, Ms. Mhosole submitted that, the case against the appellant was proved beyond reasonable doubt because two ingredients have to be proved in the unnatural offence. **First,** whether there was penetration, and **second** if it was the appellant responsible. She argued that, in the appeal at hand both ingredients were proved beyond reasonable doubt against the appellant as held in the case of **Magendo Paul & Another vs. Republic** [1993] TLR 219.

On the last ground of appeal, she challenged the appellant's claim that, his defence evidence was not considered. She argued that, the same was considered in the trial court's judgment. She prayed that, this appeal be dismissed for want of merit and that the trial court's decision be upheld.

In his rejoinder, the appellant's counsel reiterated his earlier submission and maintained that the case against the appellant was not proved at the required standard and the irregularities pointed earlier are not curable under section 388 of the CPA.

After going through the trial court's records as well as the parties' submissions, I find the main issue for determination to be whether the case against the appellant was proved at the required standard. As the 1st and 2nd

grounds of appeal raise similar complaints against the charge sheet, which is said to have charged the appellant without including the penalty provision, and that he was sentenced on the charge to which he did not plead. and that the charge was defective, I will start with these two grounds of appeal and dispose of them together. The law is certain and the Court of Appeal decision is at one regarding the importance of citing the penalty provision in the charge sheet. Facing exactly similar scenario as in the present appeal, the Court of Appeal in the case of **Godfrey Simon & Another vs. The Republic**, Criminal Appeal No. 296 of 2018 CAT at Arusha (unreported) had this to say regarding non-citation of the sentencing provision;

> *"The essence of citing a provision which prescribes the sentence was emphasized by the Court in a number of cases including the cases of* ***SAID HUSSEIN VS REPUBLIC,*** *Criminal Appeal No. 110 of 2016,* ***GEOFREY JAMES MAHALI VS THE DIRECTOR OF PUBLIC PROSECUTIONS,*** *Criminal Appeal No. 332 of 2018 and* ***MUSSA NURU @ SAGUTI VS REPUBLIC,*** *Criminal Appeal No. 66 of 2017 (all unreported). In the latter case, confronted with a similar scenario, whereby punishment provision was not cited in the charge sheet, the Court stated the consequences as follows:*
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> > *"Even in this case, we think, the appellant was required to know clearly the offence he was charged with together with the proper punishment attached to it.* ***We are of a settled mind that failing to cite sub section (2) of section 154***

which is a specific provision for punishment to a person who committed an offence of unnatural offence to a person below the age of [eighteen] might have led the appellant not to appreciate the seriousness of the offence which was laid at his door. On top of that, he might not have been in a position to prepare his defence. *(See- Simba Nyangura's case).* ***The end result of it is that he was prejudiced****" [Emphasis supplied]*

It is thus settled law that, the punishment/sentencing must be specified in the charge so as to enable an accused person to understand the nature of the charged offence and the requisite punishment. In the present case, the omission to state the punishment provision prejudiced the appellants who was not made aware of the serious implications of the offence charged, the gravity of the impending sentence and as such, they were unable to make an informed defence. See - ***GEOFREY JAMES MAHALI VS THE DIRECTOR OF PUBLIC PROSECUTIONS*** *(supra),* ***JOHN MARTIN MARWA VS REPUBLIC,*** *Criminal Appeal No. 20 of 2014, and* ***ABDALLA ALLY VS REPUBLIC,*** *Criminal Appeal No. 253 of 2013 (all unreported).*

The court went on to state that;

"We asked ourselves if the omission could have been remedied. This was possible before the conclusion of the trial if the prosecution had sought leave of the trial court to amend the charge in terms of section 234 (1) of the CPA. In the event, this did not happen, it follows that, the charge remained defective throughout the pendency of the proceedings. ***This vitiated the trial***

rendering the proceedings and judgments of the courts below to be a nullity." (Emphasis mine)

I am not only fully subscribing to the position above but also bound by it that, omission to state the punishment provision prejudiced the appellant who was not made aware of the seriousness of the offence charged and the gravity of the sentence likely to be imposed. In the circumstances, he was unable to make an informed defence which prejudiced him and vitiated the trial. The omission also rendered the proceedings and judgment of the trial court a nullity. Now that the charge upon which the accused was defective, I find no need to be labour discussing other grounds of appeal, as this is sufficient to dispose of the case for going to the other grounds serves no useful purpose but only for academics, which is not the role of this court.

Now having so held, what is the right recourse? It was the duty of the prosecution and the court to ask for or order the amendment of the charge. They did not do so, and led the victim and other witnesses to prove the defective charge. Given the situation, then the matter is taken not heard because the charge was defective when it was filed and it remained so to the end. In the circumstances, the right of the victim has not been determined fully. in my considered view, in the interest of justice particularly

of both the appellant and the victim, the only remedy is retrial so that the appellant could be afforded a fair trial as held in the case of **Fatehali Manji vs. The Republic** [1966] EALR 343 where the following was observed regarding retrial:

> *"In general a retrial will be ordered only when the original trial was illegal or defective,* ***it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial****, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and* ***an order for retrial should only be made where interest of justice require it"*** *(Emphasis mine)*

I hold so because the allegation against the accused person is very grave, in as far as the same need to be made clear in the charge sheet in terms of the penalty provision for the interest of the appellant, equally the interest of the victim who had no duty to draw the charge sheet and was no fault on the omission to include the penalty provision in the charge sheet also needs to be protected. All these considered, I find the interest of justice requires the case to be ordered for retrial. In light of the above analysis, I do not find the need to belabor on other grounds of appeal as these two

suffices to dispose of the appeal in its entirety. In the circumstances, this appeal is allowed to the extent explained hereinabove. The case be remitted back to the trial court so that the matter can start afresh before another magistrate.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 07th day of August, 2023.

J.C. TIGANGA

JUDGE