IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NUMBER 4721 OF 2024

CASE REF NO 202402222000004721

Originating from Mkuranga District Court Criminal case no 333 of 2023, Hon Mwailolo-SRM

KHALFAN ABEID JONGO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT:

29th May & 28th June 2024

KIREKIANO, J:

On 25/08/2023, the appellant found himself on the wrong foot before the District Court of Mkuranga. He was charged with one count of unnatural offence c/s 154 (1) (a) and 154 (2) of the Penal Code Cap 16 [RE, 2022]. The allegation was that on an unknown date of July 2023 at Mindevu Viazi area Mkuranga District Court, the accused did have carnal knowledge of a boy aged 11 years against the order of nature.

For good reasons, I shall sufficiently refer to the boy as the "victim" without divulging his name. After a full trial, the trial court was convinced that the charge was proved to the required standard; it convicted the appellant and consequently inflicted a custodial sentence of thirty years imprisonment.

The facts leading to the appellant's arrest and trial are that the appellant and the victim's parents are neighbors at Mkuranga. On an unknown date in July 2023, the appellant allegedly asked his neighbor (the victim's mother) to allow the victim to sleep over at the appellant's house. It was PW2 Holiness's (the victim's mother) testimony that having consulted her husband, she allowed the boy to sleep over at the accused house.

After sometime in August 2023, she noticed a weird trend with the boy: He would wear long T-shirts, sit with difficulty, and always avoid (PW2). When she asked the boy, the boy told her the truth (sic). The matter was thus reported to the police at Vionzi police station, who issued her with PF3 for the victim's medical examination.

On 14/08/2023, the victim was examined by PW3 Fatuma Zuberi. According to her examination of the victim, the victim's anus was open with

sprinter muscle loose enough to allow stool to pass without the victim's control. She opined that there was penetration. She also tendered her finding in PF3 (exhibit P – 1).

The officer who investigated the case PW4 WP 2867, Sgt Beatrice, testified that the accused committed the offence while at home alone with the victim after his wife had gone to the village for maternity.

The victim testified as PW1, and his version was that when he was at the accused's house, the accused asked him to wear *a kitenge*. He did set up a pornography video for him to watch, and he then forcefully sodomised him. The accused then threatened to kill him if he told everyone. He then got out of the accused room, sat at the door, and in the morning, he went home. After his mother suspected something devious had happened, he later told his mother PW2 what had transpired at the accused residence.

The appellant's defence was utterly denial. He testified as DW1 Khalfan Abeid Jongo that the victim's parent together accused him of sodomy of the boy, but that was not true; it was also his defence that the accusations were cooked because the house is too close to PW1's parents. They would have

heard the victim crying. He denied that his wife travelled to the village in July and that he remained at home alone.

DW3 Salha Ahmad was the appellant's wife. She said she did not travel to a village in July 2023, and the victim had never slept at the accused's house in her absence. DW2 Hussein Ally Degoza, the accused neighbour, knew about the accusation against the accused. According to him, it was not true the accused was of good behaviour. He even advised the accused not to pay Tshs 50,000/=, allegedly demanded by the victim's parents for medical attention of the victim.

Based on the above evidence, the trial court found that the evidence of PW1, the victim, was credible, proving penetration and that the same was corroborated by the evidence of the doctor. It also rejected the appellant's defence that the victim had not slept at his residence, reasoning that it was contradictory and an afterthought. Dissatisfied, the appellant appealed to this court, posing seven grounds for appeal: -

1. *That the Trial Magistrate erred in law and fact by holding that the prosecution side proved their case beyond reasonable doubt.*

2. *That the Trial Magistrate has failed to properly evaluate the evidence presented before the trial court;*
3. *Exhibit P1 was admitted and relied on contrary to law due to following reasons; i. It was never read after it was admitted into the list of evidence. ii. PW3 identified herself during her testimony as Assistant Medical Officer but record shows she signed Exhibit P1 as Senior Medical Officer for Mkuranga.*
4. *That the Appellant's was not properly accorded the right to be heard on the 5th day of September 2023.*
5. *That the learned trial Magistrate grossly erred in law in holding the Appellant's conviction relying on the evidence of PW-1 which was wrongly moved under Section 127(2) of the Evidence Act, Cap 6 as amended by Act No. 4 of 2016.*
6. *That the learned trial magistrate grossly erred in law by failing to put the testimony of PW-1 to the credibility test before relying on it to convict the appellant.*
7. *The Trial Magistrate erred in law and fact in holding Appellant's conviction without considering the uncontested testimonies of DW-1, DW-2 and DW-3.*

Mr Charles Lugaila, a learned advocate, represented the appellant, while Miss Laura Kimario, a learned state attorney, represented the respondent. The appeal was heard by way of written submissions.

Submitting the grounds of appeal, Mr Lugaila addressed the 1st and 2nd Grounds of Appeal together on a complaint that the Trial Magistrate erred in holding that the prosecution side proved their case beyond reasonable doubt; the other complaint is on evaluation of evidence by the trial Court. The complaint was that the date of the offence was unknown, and the victim's father ought to have been summoned to corroborate PW2's testimony that the victim did go to the appellant's home. He also argued that there were contradictions in the date of the medical examination (PF-3) and the date it was reported to the police.

On the 3rd ground, Mr Lugaila, argued that the medical report Exhibit P1 was admitted and improperly relied on the contrary to the law since it was never read after it was accepted into the list of evidence. He relied on Robinson **Mwanjisi Obinson Mwanjisi & 3 Others V. R [2003] TLR 218 and Mwinyi Jamal Kitalamba @ Igonzi & 4 Others V. R [2020] TLR 50** to the effect that documentary evidence not read to the accused during the trial should be expunged. On the other angle, he argued that PW3 Identified herself during her testimony as an Assistant Medical Officer, but the record shows she signed Exhibit P1 as a Senior Medical Officer for Mkuranga; hence, her testimony was doubtful.

On the fourth ground on the right to be heard, he submitted that after the preliminary hearing, the prosecution prayed to proceed with the trial hearing; the record did not show that the prayer was granted, but the witness (PW-1) was immediately recorded and proceeded with testimony. The appellant's counsel complained without citing any law that the trial court should have informed the appellant of his right to have legal representation. Since this was not done, the appellant was denied a fair hearing. He cited a decision by, Mwalusanya, J (as he then was), **Khamis Hamis Manywele V R, Criminal Appeal No. 39 Of 1990** (unreported) to the effect that fair hearing include legal representation.

On the fifth ground, Mr. Lugaila submitted that the evidence of PW1 was improperly admitted since the learned trial Magistrate did not comply with the procedure under section 127 (2) of the Evidence Act in extracting the witness testimony. He took the view that the evidence should be expunged. In support of this, he Cited Mohamed **Ramadhani @ Kolahili Versus R, Criminal Appeal No. 396 Of 2021**, Stressing that the manner of giving the promise must be reflected in the trial court record.

On the sixth ground, the appellant's counsel argued that the trial magistrate failed to put PW1's testimony to the credibility test before relying

on his evidence to convict the appellant. According to him, no analysis was done on how the victim was able to walk for the entire month of July 2023 until August 2023 and why it took the victim one month to tell his mother, and on the date of the offence, considering the defence evidence by DW-1, DW-2 and DW-3 that the Appellant's wife (DW-3) was present at home on the entire month of July 2023.

On the seventh ground, he argued that the defence evidence was not considered by the trial court; thus, this omission invalidates the conviction. He cited the case of **Abel Masikiti vs Republic (Criminal Appeal 24 of 2015) [2015] TZCA 8 (21 August 2015),**

The respondent, through Miss Laura Kimario, responded on the first ground that the trial court was justified to find conviction on the strength of the PW1 testimony, on the principle stated in **Selemani Makumba Vs Republic [2006] TLR 379** that the best evidence is that of the victim. According to her, the victim sufficiently explained how the appellant sodomised him and that the evidence was corroborated by PW2, who said she did let the victim sleep at the appellant's house.

Regarding the age of the victim, she argued evidence of the medical practitioner (PW3) was enough proof of the victim's age, citing **Isaya Renatus Vs Republic Criminal Appeal No 542**,

On the second ground, Miss Kimario reiterated her submission on the first ground and said the trial court considered the evidence of PW1 was corroborated by the evidence of PW2 and PW3. Again, the court found that DW1's evidence was contradicted by that of DW3, who stated that PW1 had never slept in their house and that the appellant never cross-examined PW1 and PW2 on that fact; thus, it was an afterthought.

On the third ground, she referred to page 11 of the proceedings and conceded that the record does not show if exhibit P1 was ultimately read. She argued this court to expunge the same. As such given the case of **Wambura Kiginga Criminal Appeal No 301 Of 2018 Cat Mwanza**, the Content of Exhibit P1 is saved by an oral account of the medical practitioner (PW3). The complaint that PW3 identified himself as an assistant medical Officer but signed exhibit P1 as a Senior Medical Officer, as appearing on page 10 of the proceedings, was minor, not fatal.

On the fourth ground of right to be heard, she submitted that on

5/09/2023, when preliminary hearing was conducted, the appellant responded to the same, and as such, he was accorded the opportunity to cross-examine the witnesses. It was her submission that no prejudice was occasioned to the appellant.

On the fifth ground, Miss Kimario referred this court to pages 11 and 12 of the trial court record, which shows that before adducing his evidence, the victim stated his understanding of the duty to tell the truth and made a promise in terms of section 127(2) of the Evidence Act. Citing **John Ngoda V Republic Criminal Appeal No.45 Of 2020**, it was Miss Kimario's submission that as long as the court extracted the child's promise to speak the truth, it was sufficient.

On the sixth ground, on the credibility of PW1, Miss Kimario said the trial court assessed his demeanor and believed that he was telling nothing but the truth and that he was credible, reliable, and trustworthy. She cited **Goodluck Kyando V Republic [2006] TLR 363**, saying every witness is entitled to credence and must be believed and his testimony accepted unless there are good and compelling reasons for not believing a witness.

On the seventh ground on analysis of the defence evidence, she

argued this court, being a first Appellate Court, can step into the shoes of the trial Court and re-evaluate the defence evidence and give its conclusion as it was stated in the case of **Wambura Kiginga Vs Republic Criminal Appeal No. 301 Of 2018.**

Mr Lugaila rejoined that the discrepancy in the rank of PW3 affects credibility since Exhibit P1 was expunged from the record. The contradiction exhibited in the proceedings makes the oral testimony of PW-3 unworthy of any belief as it was held in the case of **Jadili Muhumbi Vs R., Criminal Appeal No. 229 Of 2021, CAT (Supra)**

Concerning the appellant's right to representation, he argues that the prosecution took advantage of the applicant's lack of representation by ensuring that the critical witness (PW-1) had testified and was cross-examined by the Accused himself.

Concerning the evaluation of evidence and credibility of witnesses, He said the victim was 11-year-old is old enough to remember the date as important as the date the PW-1 purported to have been sodomised by the Appellant. Even if the victim, for some reason, had forgotten the said date,

it is impossible for both parents who claimed the victim went to the appellant's home.

On my part, I will start with the fourth ground on the complaint of denial of the right to be heard. I find this pertinent issue, being alive to the decision **Abbas Sherally & Another Vs Abdul S.H.M. Fazalboy Civil** Application No. 33 of 2002 (unreported), this Court did not hesitate to hold that: -

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard because the violation is considered a breach of natural justice".*

I have revisited the trial court record. It shows that the appellant advocate appeared on 11.9.2023 after PW1 and PW2 were heard. There is no record nor argument that the appellant advocate had appeared before or informed the court that he would appear to defend the appellant. I have read the decision in **Hamis Manywele V R, Criminal Appeal No. 39 Of 1990** (unreported). The high court judge, **Mwalusanya J**, ruled that the trial was

a nullity because the indigent appellant was denied the right to legal representation paid for by the state.

I am not persuaded by this decision as applicable in this appeal. It is nowhere indicated that the appellant is indigent. Thus, in the interests of justice, it was desirable to accord him legal aid under the Legal Aid (Criminal Proceedings) Act Chapter 21. After all, the appellant hired his advocate but did so later.

In any case, as Miss Kimario submitted, and rightly so, the appellant did participate in the proceedings; thus, despite lacking representation when PW1 and PW2 testified. It would have been different if it was a requirement of law, as in capital offences, that a person accused of a sexual offence must have legal representation. I see no merit in a complaint that he was not heard. The fourth ground fails.

On the fifth ground, the record shows that the trial court, in extracting the promise from the victim, who was 11 years old, recorded his promise to tell the truth but did not record his promise not to tell lies. I have read the decision in **Mohamed Ramadhani @ Kolahili** cited by Mr Rugaila; in this case, the jurisprudence in this aspect has its development in the later

decision by the Court of Appeal in **Mathayo Lawrence William Model vs Republic (Criminal Appeal No. 53 of 2020) [2023]** TZCA 52. The Court of Appeal considered this aspect of putting the witness under test in terms of section 127 (2) and the wording of promise and held;

> *In our considered view, that requirement would only be necessary if the child witnesses testified on io 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 (emphasis supplied) Emphasis supplied.*

As such, in the above-cited case, the court of appeal on the effect of not recording the promise not to tell lies found that was not fatal.

> *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*

I thus find that the procedure before reception of the same was complied with under section 127 (2) of the Evidence Act. The fifth ground of appeal fails, the evidence of the victim (PW1) will be reevaluated.

The third ground should not detain me much, as rightly submitted by the parties. The trial court record does not show if the PF3 exhibit P1 was read and explained to the appellant. It is a well-established principle of law that when an exhibit is cleared for admission in court, it must be read out in court for its contents to be known. Since this was not done, thus exhibit P1 is expunged from the record. The third ground of appeal is upheld.

I shall now address the 6th, 2nd, and 7th grounds of appeal. These grounds are interrelated as they involve evaluating evidence and the credibility of the witnesses' testimony.

Being the first appellate court, this court can re-evaluate the evidence on record and come up with its findings. See the case of **Kaimu Said v. Republic, Criminal Appeal NO 391/2019**, which cited with approval the case of **Siza Patrice v. Republic, Criminal Appeal No. 19 of 2010** (unreported) that:

> "*We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary.*

The follow-up question is whether there was enough evidence for the trial court to find the appellant's conviction on the appellant. We now remain with the evidence of the victim (PW1), his mother (PW2), the medical practitioner (PW3) and the investigator Sgnt. Beatrice (PW4).

From the evidence of the medical practitioner (PW4), the same suggests that there was penetration against the victim. I wish to remark in few words the inconsistency in his rank, as alleged by the defence counsel, was considered but found minor, not touching the substance of his testimony. This witness did not say who sodomised the victim and when the victim was abused. This piece of evidence is corroborative; the task is to determine who abused the victim.

I have also considered the evidence by PW4 Sgnt, Beatrice; from her testimony, I see nothing independent corroborating the victim's evidence. The victim described the alleged scene of the crime, including the presence of pornographic video; it was expected that, as an investigator, she would have gathered more evidence to narrow down the facts instead of just relying on the statement of PW1 only. I say so because no effort was made to suggest DW1 was not telling the truth.

When the evidence of the victim, PW1, and that of his mother, PW2, is put together, the evidence is clear that the date of the commission of the offence is unknown. However, it suggests that it was July 2023, and circumstantially, the offence was committed when PW2 allowed PW1 to sleep over the appellant's house in the absence of the appellate wife. The appellant's version is the reverse; he denied it and stressed that his wife never left the marital home in July.

Before I go further, I find it apt to address the aspect raised by defence counsel Mr Rugaila that the victim's credibility was affected by the delayed report of the alleged incident. I have revisited his testimony. According to him, he was afraid. As such, the victim talked to his mother on 14.8.2023; it is incorrect to say that he delayed deciphering whatever happened to him for a month. According to the charge and all evidence on records, the exact date was unknown. In any case, this being a sexual offence, the aspect of time to report alone should not discredit the witness.

In **Kennedy Paul Mosha vs Republic (Criminal Appeal No. 578 of 2020) [2024] TZCA 413 7 June 2024.** The court of appeal cited Nikki ***Godfrey, Assistant State Coordinator for West Virginia Foundation for Rape Information and Services (WVFRIS);*** thus

> *For a child, sexual abuse can go on for months or even years before they tell someone and the victim may be threatened or coerced to keep it secret. Some victims may even be manipulated into thinking that the incident was their fault. One of the biggest hurdles that victims have to overcome is fear of not being believed when they report a sexual assault and also blame themselves following the assault.*

Looking at the evidence of PW1, I am aware of Miss Kimario's position on the best evidence principle in the case of **Selemani Makumba.** However, this does not preclude this court from considering other evidence, including weighing and testing it. I also accede to the position that the credibility of a witness is the monopoly of the trial court, but only in so far as demeanour is concerned. See **Shaban Daudi vs Republic, Criminal Appeal No. 28 of 2001, and Edson Mwombeki vs Republic, Criminal Appeal No. 94 of 2016** (both unreported); in this, the evidence of PW1 has to be tested, with the evidence of other witnesses, including that of the accused person.

PW1 and PW2 suggested that the offence was committed overnight when the appellant's wife was away. While the victim did not recall the date, and the exact date is not mentioned in the charge, I have considered PW2 testimony with reservation as to how she could not remember the date she

made such a critical decision, if any, to let her son sleep over in appellant house in the absence of his wife. The trial court, in its evaluation, found as a fact that PW1 did sleep at the appellant's house in the absence of his wife, reasoning that the appellant did not cross-examine PW1 on this. It remarked;

> *The fact that PW1 was asked to sleep at the accused's place was not challenged during cross-examination, not only against PW1 but also against PW2. This means the accused admitted that PW1 happened to sleep at his home*

With respect, I am unable to subscribe to this conclusion because the trial court did not, on the other hand, consider the defence case on this fact with equal weight.

This takes me to the seventh ground on defence evidence; It is the law that failure to consider the defence is fatal and vitiates the conviction. The spirit in the cited case of **Abel Masikiti (supra)** that the essential ingredient of a judgment in a criminal case under section 312 (1) of the **Criminal Procedure Act Cap. 20- [R.E. 2022]** includes the defence case analysis. Considering the defence cases means that equal effort should be made in analysing both prosecution and defence cases and give the same

deserving critical analysis. In this appeal, the appellant's defence disputed the commission of the offence and denied the allegation that he committed the offence when his wife was away.

I have revisited the defence case by DW1, DW2, and DW3. The prosecution cross-examined none of these witnesses. It follows that going by the reasoning of the trial court and the decision in **Issa Hassan Uki v. Uki, Criminal Appeal No 129 of 2017** and **Martin Misara v. R, Criminal Appeal No 28 of 2016** (both unreported), the evidence by DW1 and his wife DW3 that DW3 never left the appellant and went to village ought to be equally believed.

In the case of **Goodluck Kyando,** cited by Miss Kimario, she argued that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and compelling reasons for not believing a witness. I would emphasize here that witnesses include defence witnesses. The seventh ground is allowed to the extent that the defence case casts doubt on the prosecution case.

The last ground to be determined is the first ground. That the charge was not proved beyond reasonable doubt. This is general one given what I have deliberated above; I find merit in this ground and allow the same that the

appellant's case was not proved beyond a reasonable doubt, the conviction of the appellant was not safe. All said, this appeal is allowed; the appellant is to be set free. He is to be released from custody and set free unless otherwise held for lawful cause.

A. J. KIREKIANO

JUDGE

28.6.2024.

COURT:

Judgment delivered in the presence of the appellant and Mr Charles Rugaila advocate for the appellant, and Miss Dorice Kawanga learned state attorney for the Republic.

A. J. KIREKIANO

JUDGE

28.6.2024.