

for indecent assault of a boy. The sentence was to run concurrently.

In this appeal, the appellant appeared in person and fended for himself, whereas Mr. Suleiman Yusuf Ali, learned State Attorney, represented the respondent (the Director of Public Prosecution).

The facts of the case gathered at the trial revealed that the appellant accused of committing the offence on two victims. The first victim of the crime was PW2, IMM. He testified that on the unknown date and time, he was kissed and sodomized by the appellant. PW2 claimed he was with PW3 (the second victim) on the material date. The second victim, HMM, testified as PW3. He stated that on the material date at 8:00 pm, he was chuoni (madrassa) with PW2, whereby the appellant closed the door and switched off the light, and the appellant asked him to go to the store. At the store, the appellant pulled down his (PW2) trouser by the knee, then made PW2 sleep in the floormat while facing down, and he sodomized him. PW3 contended that when he was sodomized, he felt pain, but the appellant threatened to beat him if he shout. It was his further testimony that later the appellant called PW2. He carried him in his lap and kissed him. He contended that he saw the appellant

kissing PW2 as the store light was on. Zulfa Haji Rajab (PW1) is the mother of the victims. She confirmed that PW3 was ten years old and PW2 was five when the offences were committed. In her testimony, she alleged that as she was worried about her kids, she asked them if the appellant assaulted them indecently, and PW3 confirmed to her that the appellant indecently assaulted him. Having received the disturbing information, PW1 decided to follow the appellant Chuoni, but they didn't find him as he was arrested for other similar crime. Then, they reported to Mwera Police station, where they were issued a PF3, and later they went to Mnazimmoja Hospital, where they were told that it was only PW3 who was sodomized. The investigator of the offence in this matter was PW5, E. 2264 Detective Cpl Jamal Himid Hassan. Among the steps he took in his investigation were to send both victims to Mnazimmoja Hospital for medical examination, visiting a crime scene and collecting witness statements. In his investigation, PW5 confirmed that PW2 was indecently assaulted and PW3 was defiled. PW4, Sabrina Ali Issa, is the doctor who medically examined PW2 and PW3. In her finding, which was filled in the PF3 and admitted in court as exhibit PI (PF3 for PW2) and exhibit PII (PF3 for PW3), she finds that it was only PW3 who was defiled as his anal muscle was not intact.

In his defence, the appellant, who testified as DW1, told the Court that on 17/01/2021 at around 9:30 am, when he was at his home, he encountered six persons, including Zainab and Mwinyi Muhsin. He contended that previously he was reported to Sheha by the said people for caning their children at Chuoni. He was then sent to Mwera Police, and the said people told him 'watamuonyesha' (they will show him). He claimed that at the Police Station, his information was not taken and that on 06/02/2021, he was sent to this Court, and information against him was read over. He testified further that he did not commit the offences and summarised prosecution evidence by showing flaws in it. DW2, Juma Kombo Maalim is DW1's father. In his evidence, he claimed that the crimes were plotted against the appellant by Mwinyi, the victim's father, due to the quarrel between Mwinyi and him (DW2). He claimed that he dug the pit latrine, but Mwinyi covered it up, so he decided to report to Sheha. Sheha reported their case to City Council, who resolved their dispute by demarcating their house with a boundary and declaring the area at the centre between their houses as a public space. DW2 claimed that offences resulted from his quarrel with Mwinyi since he was told by him that "atamfanyia jambo jengine". DW3, Hamdu Ali Makame is among the

madrassa leaders. In his evidence, he told the Court that they did not notice if the appellant was a rapist.

From the evidence adduced, the learned magistrate formed three issues that are, **One**; whether PW3 was indecently assaulted by the appellant, **Two**; whether PW2 was defiled by the appellant, and **Three**; whether the doubts marked by the appellant against prosecution evidence have weight.

In answering the first issue, the learned magistrate found PW3 to be a credible witness and that the evidence of PW4 and exhibit PEI corroborated his evidence. He was, therefore, satisfied that the appellant assaulted PW3 indecently.

Regarding the second issue, the learned magistrate, based on the testimony of PW2 and PW3, believed that they were truthful witnesses and found that the appellant defiled PW2. Lastly, the learned magistrate found all the doubts raised by the appellant on the prosecution evidence lack merit. Finally, the learned magistrate found the case against the appellant was proved beyond reasonable doubt and proceeded to convict the appellant and sentenced him as stated herein earlier.

The appellant was aggrieved by the trial court decision hence this appeal which has five grounds crafted in the Swahili

language. Conveniently, grounds of appeal can be boiled down into one ground that the learned magistrate erred in law in relying on insufficient prosecution evidence to convict the appellant. As I noted from the proceeding, the learned magistrate conducted a *voire dire* to PW2 and PW3 but did not determine whether they possessed sufficient intelligence to testify and whether exhibits PEI and PEII were read aloud in court after being admitted in evidence. Accordingly, before the hearing commenced, I directed each side, when submitting on the ground raised, to address the Court on the appropriateness of the said piece of evidence.

I will start with the points raised by the Court as they are ample to dispose of the entire appeal. Since these are legal issues, the appellant, as a layman, had nothing to address the Court. On the other hand, Mr. Ali learned State Attorney, in responding to the omission of the trial magistrate to make a finding on whether PW2 and PW3 possessed sufficient intelligence to testify, stated that there was no need for the learned magistrate to make such findings. Reacting to the query of if the exhibit PEI and PEII were read aloud in court after being admitted in evidence, the learned State Attorney stated that the trial court proceedings show that both exhibits were read out in court after being admitted.

PW2 and PW3 are children of tender age. Therefore, their evidence must be received in court after their competence to testify and their knowledge of the nature of an oath being tested by conducting a *voire dire* examination. It is, therefore, the requirement of the law, after conducting a *voire dire* examination, for the magistrate or judge to record his opinion on two things, first whether the child witness is possessed of sufficient intelligence to testify and second, whether he understands the duty of speaking the truth, before the evidence of a child can be received upon oath or affirmation, or without an oath. This is according to section 133 (3) of the **Evidence Act** No 9 of 2016, which provides: -

*"Where in any criminal proceeding or matter, a child of tender age called as a witness does not, in the opinion of the court, understand the nature of the oath, his evidence may be received though not given upon oath or affirmation, **if in the opinion of the court which shall be recorded in the proceeding, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth**".*

[Emphasis added]

In the matter at hand, the learned magistrate conducted a *voire dire* to both child witnesses, as shown on pages 7, 9 and 10 of the typed proceedings. His opinion for PW2, as seen on page 7, was recorded as follows: -

"Mah:

Mtoto amefahamu maana ya kiapo na anaapishwa na anaeleza"

And on page 10 his opinion was as follows: -

"Mahakama

PW3 Anaelewa maana ya kiapo na kwa hivyo anaapishwa na kueleza yafuatayo:"

Both opinions of the learned magistrate may be interpreted as 'a child witness understands the meaning of the oath, he is sworn and states:'

It is clear the learned trial magistrate, in his opinion, did not make the finding on the competency or ability of the child witnesses to testify, that to say, they possessed sufficient intelligence to justify the reception of their evidence. The question that follows is whether such omission is fatal to the proceedings. The learned State Attorney contended that the magistrate doesn't need to record his opinion on an ability of a

child of tender year to testify, and if he understands the nature of an oath, therefore, it is presupposed that for him, the omission is not fatal. With due respect to the learned State Attorney, it is mandatory for the court to make its finding on those two conditions before receiving the evidence of the child of tender age. The Court of Appeal of Tanzania in **Mussa Ali Ramadhan vs Director of Public Prosecutions** (Criminal Appeal 426 of 2021) [2022] TZCA 375 when referring to their previous authority in **Issa Amir @ Koshuma vs Republic** (Criminal Appeal No. 120 of 2020) [2022] TZCA 195, observed that the omission to make a finding that a child of tender age possessed sufficient intelligence to understand questions and give rational answers to be fatal and declared the evidence invalid.

Guided by the above authorities, therefore, I have no other option apart from expunging the evidence of PW2 and PW3 from the record. Therefore, without the evidence I have expunged, the charge against the appellant cannot stand since the remaining witnesses' evidence is so weak to establish the offences against the appellant.

In the upshot, I am satisfied that the prosecution failed to prove the charge against the appellant. Thus, I allow the

appeal. I accordingly quashed both convictions and set aside the sentences imposed on the appellant. The appellant is to be released from jail (Chuo cha Mafunzo) forthwith unless he is otherwise being held therein for other lawful cause. It is so ordered.

Dated at Tunguu, Zanzibar this 07th June 2023.



G. J. KAZI
JUDGE
07/06/2023