IN THE HIGH COURT OF ZANZIBAR
AT TUNGUU
CRIMINAL APPEAL NO 30 OF 2023

(from Criminal Case No 44 of 2022, Regional Court, Mwera)

NASSIR OMAR NGODA .....APPELLANT

VS

DPP.....RESPONDENT

JUDGMENT

Date of Last order: 10.01.2024
Date of Judgment: 17.01.2024

S. A. HASSAN,J.:

In the Regional Court at Mwera the appellant was indicted for defilement of a boy contrary to section 115(1) of Penal Act No 6 of 2018, laws of Zanzibar (Penal Act). It was alleged that on 05.06.2022 at about 12:00hrs at Michamvi, Southern District of Unguja, the appellant had against the nature, carnal knowledge SAS (name withheld), a boy who was nine (09) years of age. The appellant pleaded not guilty to the charge.

The gist of prosecution case at the trial is as follows: PW1, victim's father told the court that he lives at Michamvi with his wife and three children, and that on 09.06.2022 at 20:00hrs he went to visit his uncle who lives nearby and he found his wife there and she told him that she was told by victim's sister that SAS has been defiled by the accused (now appellant). After receiving that information PW1 went to see the accused in his shop and told him they need to talk about what happened but the accused said he received a call from his boss to send his wife home and he will come back. PW1 waited for the accused until 22:00hrs but he never returned. On the second day he asked SAS what did the accused do to him and he said he defiled him in the shop, and after that he reported to the sheha and went to Paje Police Station with SAS and was given a letter to go to Makunduchi Hospital for examination and the doctor confirmed that SAS was defiled. PW1 continued by stating that he knew the accused as they are neighbors.

PW2, the victim, whom after *voire dire* test conducted and the trial magistrate was satisfied that he understands the meaning of oath and gave his testimony on oath told the court that he is nine years old, studying at Michamvi School. He went on stating that on 05.06.2022 at 12:00hrs he was sent to buy sugar at one Idrisa's shop and he did so, and sent the sugar home and left, he passed by Mussa's shop and found the accused inside the shop and he was called in by the accused and he gave him game to play, while he was playing the game the accused removed SAS's trousers and his trousers and had sodomized him and gave him soda afterwards but SAS refused it. PW1 went on stating that when he went home there was no one hence he went to madrasa and he told his father about the incident in the evening.

PW3, victim's mother told the court that on 09.06.2022 at 19:00hrs she got information from her daughter Salma that SAS had been sodomized by the accused. Upon requesting who told Salma that, she said she was told SAS's friend. She asked SAS about that and he confirmed that the person who sodomized him was the accused but he did not say which day the incident occurred. PW3 told her husband who told her that he heard about it and he is making a follow-up. PW4, medical Doctor at Makunduchi Hospital who examined PW2 and found out there was an anal opening and the anal muscles were not intact, after the examination he filled in the PF3 which was tendered in the court and marked exhibit P1. PW5, police officer who investigated the case and visited the scene of crime.

In the defense DW1 told the court that he remembers one morning at 10:00hrs while he was at shop two police who wanted to interview him hence he has to go to the police station, at 12:00hrs he reached Paje and he was placed under custody for three days and on the fourth day he was sent to the court. He also said that the allegations are mere fabrications as PW1's evidence was just hearsay and he knows the DW1. On PW2, his statement should not be relied as he said DW1 does not sell in the shop. PW3's evidence is also hearsay. PW4 is a doctor and he did not show his credentials and PW5, the investigator does not understand anything about DW1. While being cross examined, DW1 stated that at the shop some days he is the one who stays and some

days the boss stays and that the victim showed the investigator another shop and not his. DW2 the shop owner, he knows DW1 as he works for him and that police came to take DW1 to Paje Police, when he followed up he was told that DW1 sodomized a child inside my shop. He went saying tha that is not possible as at his shop there are always people and at front of the shop there is a *maskani* and *mgahawa.* While cross examined he stated that DW1 is the one who stays at the shop, and the day he was taken by the police there were people at the shop but people at the *maskani* did not know what was going on as it is not a must for them to know what is going on inside the shop.

Upon completion of the trial the court convicted the accused and he was sentenced to seven (7) years at Chuo cha Mafunzo and to pay the victim compensation of Tsh 300,000/- (three hundred thousands). Aggrieved by the conviction and sentenced, the appellant filed this appeal on the following grounds:

1. That the learned Trial Magistrate erred in law and in fact to convict and sentence the appellant, according to the proceeding, based on the evidence of PW2 which is invalid for having improperly received.
2. That the learned Trial Magistrate erred in law and in fact in accepting the evidence of the prosecution side at its face value for conviction and sentence against the appellant for not having first resolved inconsistencies and contradictions availed therein.
3. That the trial court grossly erred in law and fact(s) to convict and sentence the appellant while the case against him was not proved beyond reasonable doubt.
4. That the trail court was wrong in corroborating the testimony of PW2 with hearsay evidence from testimonies of PW1, PW4 and PW5 hence arrived at the wrong findings.
5. That the trail court grossly erred in law by supporting its conviction against the appellant on the evidence of exhibit P1 (PF3) that was improperly admitted in court during the trial for having not first being read out in court loudly to enable the appellant hear what it was all about.

6. That the learned Magistrate erred in fact in entering conviction against the appellant on predominantly denial by the appellant the right to professionalism information from the doctor who examined the complainant and inserted results in PF3.
7. That the learned Magistrate erred in law and in facts in his decision by convicting and sentencing to jail the appellant without considering the appellant's defense.
8. That trial court grossly erred in law and fact(s) in failing to explain the right of appeal to the appellant after convicting and sentence the appellant.

On hearing date the appellant enjoyed the service of Advocate Isaac Msengi who told the court he will argue all the grounds expect he wishes to withdraw the fourth grounds. The respondent was represented by State Attorney Dawa Suleiman.

In the first ground of appeal, it was submitted that the conviction was wrong as the court relied on evidence of PW2 who was the victim and a child of tender age, and according to S.133(3) and (7) of Evidence Act (EA)No 09/2016.

The importance of *voire dire* test as per S.133(3) of EA was explained by referring to the cases of **Jackson Davis Vs R and Jumanne Daniel Kipandei Vs the Republic (HCT at Morogoro) Criminal Appeal No 71 of 2022** (unreported), sub (7) of S.133 where the law puts a requirement of the court to satisfy itself if the child of tender age is telling nothing but the truth. Whereby according to the defense counsel the trial Magistrate did not consider other factors and the same was not mentioned in the judgment, hence the court received evidence from incredible witness.

Submission for the second ground has it that evidence adduced at the trial court from PW1 to PW5 is contradictory and the court never addressed on the same. To start with, charge sheet mentioned the date and time of which the offence is alleged to have been committed as well as the age of the victim, but testimony of PW2 indicates that he was sent by his mother to buy sugar. Finding the contradiction, counsel went on stating that PW2 said he goes to school and comes back at 13:00hrs and when he came back he

was sent to buy sugar. Time factor according to the defense attorney is contradictory from the statement of the offence and the time he was sent to buy sugar.

Another piece of contradiction is the fact that PW2's told the court that after he was sodomized he told his father on the same day and he was sent to hospital and police, however, PW1 who is victim's father said he got information from PW3 on 09.06.2022 at 20:00hrs. relying on the case of **Vumi Liapenda Mushi Vs The Republic, Criminal Appeal No 327 of 2016 CAT at Arusha** (unreported) where the court held that if there are inconsistence, the benefit remain to the appellant.

On the third that the prosecution failed to prove the case beyond reasonable doubt as the charge in hand needed to be proved because the victim said he comes back from school at 13:00hrs while statement of the offence indicated that the incident happened at 12:00hrs as well as the charge says the date of incident was 05.06.2022 but reporting to the authorities was done on 10.06.2022 and there was no explanation made by the prosecution as to why there was delay between the incident and the reporting.

Another doubt is that PW2 said he shouted but there was no one and when he went home he found no one and he went to madrasa, had the incident really occurred he could not be in the position to madrasa as the impact would have been really big.

S 108 (4) of the Penal Act No 6/2018 provide that sexual offences are proved by penetration and age of the child, however, the evidence adduced never showed if there was penetration as PW1 to PW5 never proved if there was penetration apart from PW2 saying "aliniingiza cheche". Trial Magistrate failed to detect fabrication made by PW2. Reference here is made to the case **of Maganga S/O Udugali Vs The Rebuplic, Criminla Appeal No 144 of 2017, CAT at Tabora** (Unreported) where the court held that sexual offences need to be proved in proper standard.

Arguing the fifth ground, it was submitted that exhibit P1 (PF3) was wrongly admitted as the proceeding does not show if content of Exhibit P1 was read over in the court, being it fatal it needs to be expunged.

Sixth ground has it that when DW1 crossed examined the PW4 who is the Doctor, he wanted him to show his experience and knowledge and he refused to mention his professional experience. Reference is made to the case of **Maganga** (supra).

The seventh ground of appeal was argued that while writing the judgment, the trial court did not regard the evidence adduced at the defense, and that caused the court to convict an innocent person. Lastly, the in the eighth ground it was argued that the right of appeal was not explained contrary to S.340(1) of CPA and S.12(6)(a) of the Zanzibar Constitution.

Finally, a prayer was made that the grounds of appeal be regarded, evidence of PW2 be expunged and exhibit P1 also be expunged from the record, conviction and sentence set aside and the appellant be released from the prison.

On the other hand, Ms. Dawa Suleiman Senior State Attorney supported the conviction and sentence by arguing as follows; on the first ground, evidence adduced by PW2 is credubke because he managed to testify well and that *voire dire* test was conducted as per the law of evidence and the trial court was satisfied that the witness knows the meaning of oath. Reference was made to the case of **Tumaini Mtayomba Vs The Republic, Criminal Appeal No 217 of 2012, CAT at Mwanza** (unreported).

On the second ground the State Attorney agrees that there were some contradictions but they were minor as it is not possible that all three witnesses speak the same unless what they speak is planned. She went on arguing that it was mentioned 05.06.2022, however, PW2 stated that he told his father and who sent him to Paje Police and then Hospital, being of a tender age it is possible that he only remembered telling his father but dates are hard to be remembered by a 9 year old boy.

Argument on going to hospital on 10.06.2022 while the incident occurred on 05.06.2022, PW2 did not say he was sent to the hospital on 05.06.2022, but he said he was sent to Police Paje and then hospital. PW1 is the one who mentioned the date they went to hospital and PW4 confirmed receiving PW1 and PW2 on 10.06.2022 Reference is made to the case of **Mohamed Haji Ali Vs DPP, Criminal Appeal No 225 of 2018, CAT at Zanzibar** (unreported).

Records show that the incident occurred on 05.06.2022, it was on a weekend, hence had the boy go to school, it was for additional classes and not normal school day. On normal school days students come back at 13:00hrs but for extra classes the normal school hours are not used.

Arguments against the third ground are that the prosecution did prove the case beyond reasonable doubt and the trial court had shown why the delay in the page 41 of the proceeding and analysis was made on the same.

The victim told the court he was sodomized, just because he went to madrasa on that day does not mean the incident did not occur, PW4's evidence corroborated that a non-sharp object had penetrated on the victim's anus hence there was penetration. Citing **Maganga's** case (supra) Doctor who prepared the PF3 was not called to testify hence PF3 was admitted after the prosecution tendered it, in the case in hand the doctor testified and the accused person had a chance to cross examined him hence the cases are of difference scenario and should not be regarded as the same.

The fifth ground was argued against on the fact that DW1 did not have any objection if PF3 is to be admitted that is why it was admitted, not reading it over is not fatal to the case as he had the chance to cross examine the DR who submitted PF3.

On ground six, State Attorney argued that PW4 is an expert witness, according to S.49 of the Evidence Act No 09/2016 it was made clear on the requirement of expert witness, and that it is not normal for an expert witness to carry academic credentials to

that, lastly, the case of **Jumanne** (supra) cited is of difference scenario that the case in hand.

Seventh ground was argued against by stating that the defense of DW1 and DW2 has been regarded and the court found out that their evidence was not as heavy as the one from the prosecution's side to convince the trial magistrate otherwise.

On the eighth ground State Attorney agrees that right of appeal was not explained in the proceeding, however, such right has been obtained, that is why there is this appeal. Citing S.381 of the Criminal Procedure Act provides for errors and omissions in the proceedings and how the same can be dealt with. Omitting the right to appeal might be slip of the pen but the same had been vocalized, as seen the case of **Mohamed Haji** (supra).

Finally a prayer was made to dismiss the appeal, conviction continued and sentence to be increased as seven years in now how the law stipulated, S.115 (1) calls for more than seven years.

Counsel for the appellant rejoined and I will summarize as follows; that Voire Dire was not tested accordingly as the three factors were not mentioned and assessment was not conducted. The discrepancies in the case are not minor but fatal. Dates and reporting from the victim to the father shows contradiction. The case was not proved beyond reasonable doubt as why PW2 were not heard by anyone. Not reading the content of an admitted document is a matter of law and not reading the same infringes the right of the appellant. Expert witness did not explain if he is experience to take care of sexual offences. He went on insisting that the evidence of DW1 and DW2 were not considered, lastly right of appeal is mandatory. Lastly he prays that this appeal be allowed as prayed.

I am hereby wish to start with the eighth ground of appeal of which I do not want to dwell much of my time on, as I find this ground has been put there just to add on numbers of grounds of appeal. Agreeing with the respondent that even if the record

does not show that right to appeal explained, however, that did not infringe the right of the appellant to appeal, hence this appeal.

I believe determining the first ground of appeal will be enough to determine the this appeal and with that I would like to address the issue of conducting *viore dire* test when taking evidence of minor as per our law. S.133 (3) of Evidence Act No 9 of 2016 provides:-

> "Where is 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 the opinion of 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.**" [bold is mine]

The records in hand in page 6 after the court finds out that PW2 is of tender age conducted voire dire test as follows:

Mah: Dini yako ipi

PW2: kiislamu

Mah:Unajua maana ya kiapo

PW2:Najua

Mah:Maana yake nini

PW2:Kusema ukweli

Mah:ukiapa unasemaje

PW2: Wallah, Billah Tallah.

Mahakama

Kwamba baada ya kumfanyia "Voire Dire Test" PW2 imeridhika kwamba anajua maana ya kiapo, kwa hiyo PW2 anatoa uhahidi kwa kiapo.

I will hereby wish to make reference to the case of **Mussa Ali Ramadhan vs Director of Public Prosecutions,** Criminal Appeal 426 of 2021 [2022] TZCA 375 where the Court of Appeal reiterated its stance that the *Voire Dire* Test saves three main purposes; **one,** to determine the child's ability to testify that is if he understands questions put to him and give rational answers (competence test), **two,** to determine whether he knows the nature of an oath so that he can give affirmed/sworn evidence (oath test), and **three,** truthfulness, where his commitment to tell the truth and not lies is of essence. Records in hand however show that the Magistrate after being satisfied that PW2 knows the meaning of oath was enough to allow him to give his testimony under oath, while leaving the two important purposes on the same. Please also see the case of **Hassan Hatibu vs Republic**, Criminal Appeal No 71 of 2002 (unreported) and **Issa Amir @ Koshuma vs Republic**, Criminal Appeal No 120 of 2020 (unreported).

Because PW2 (the victim) is a very important witness in cases of this nature, however, the evidence adduced by him if it is left the way it is, it will amount to miscarriage of justice on both sides as the conviction and sentence of a trial court were founded on defective proceeding for the want of conducting proper voire dire test.

Stating that I find myself deliberating whether I should order a retrial or not. I do hold opinion that since it is the trial court that wrongly did the voire dire test to cause such nullity, citing the case of **Fatahali Manji Vs The Republic** [1966] EA 343 where Court of Appeal of East Africa held that

> "In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence at the first trial… 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."

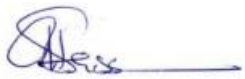
See also the case of **Ahmed Ali Dharamsi Sumar Vs The Republic** [1964] EA 481.

Given reasons states above, I find it of no point dwelling on the remaining grounds of appeal because I am hereby making the following orders so as to meet the justice on this case.

That I first nullify the proceedings, the conviction and I quash and set aside the entire judgment and the sentence. And I am on a firm opinion that this is a proper case to order a *trial de novo*, hence I order that the trial court record be immediately returned to the Regional Court at Mwera for it to commence the retrial expeditiously unless the Director of Public Prosecutions is no longer interested in prosecuting this case.

In the meantime, the appellant shall remain in custody awaiting trial.

It is so ordered.



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S.A.HASSAN

JUDGE

17.01.2024

This Judgment has been read over today, in the open Court in the presence of SA Dawa Suleiman for the Respondent, Appellant and Advocate Isaac Msengi for the appellant.

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S.A.HASSAN

JUDGE

17.01.2024