

TANZANIA / JUDGMENT

emmanuel john mollel vs the republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA DISTRICT REGISTRY
AT ARUSHA CRIMINAL APPEAL NO. 57 OF 2023 (Originating from the District Court of Arusha at
Arusha before Honourable D. J. Msoffe, PRM dated 21st December 2022 in Criminal Case No. 66
of 2020) EMMANUEL JOHN MOLLEL..... APPELLANT VERSUS
THE REPUBLIC..... RESPONDENT

JUDGEMENT

07/11/2023 & 17/11/2023 KINYAKA, J.: The Appellant was on 21/12/2022 convicted by the District Court of Arusha of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16, R.E. 2022. The Appellant was sentenced to serve thirty years imprisonment in jail. Aggrieved by the conviction and sentence, the Appellant preferred eight grounds of appeal which are reproduced herein below:

1. That the trial court erred in law and in fact in not complying with the mandatory provision of section 234(2)(b) of the CPA [Cap 20 R.E. 2022] as the trial court failed to recall PW1, PW2, and PW3 to give i their evidence afresh and be further cross-examined by the appellant after the charge was substituted, hence the evidence of PW1, PW2 and PW3 should be expunged;
2. That the trial court erred in law and in fact in failing to comply with the requirement of section 127(2) of the Evidence Act [Cap 6 R.E. 2019], there was failure by the trial court to test the competence of PW2 (the victim) and know whether he understood the meaning and nature of oath, before it concluded that PW2 does not know the meaning of an oath and that, his evidence could be taken as the promise to the court to tell the truth and not lies;
3. That the trial court erred in law and fact in not finding that there was variances on location between the charge and prosecution evidence which render the charge incurably defective;
4. That, the trial court erred in law and facts in failing to observe that there was unexplained delay by PW2 (victim) of naming and reporting the incidence hence this creates doubt as to whether the allegations against the appellant are true; 2

5. That the trial court erred in law and fact in holding that PW1, PW2, PW3 and PW4 were credible and reliable witnesses;
6. That the trial court erred in law and facts in failing to evaluate and subject the entire evidence to scrutiny;
7. That the trial court erred in law and fact in failure to consider the defence evidence of the Appellant; and
8. That the trial court erred in law and fact in not finding that the prosecution side failed to prove the case against the Appellant to the required standard of law. At the hearing of the appeal, the Appellant appeared in person and the Respondent was duly represented by Ms. Alice Mtenga, learned State Attorney. The Appellant prayed to argue grounds 1, 2, 3, 7, and 8 separately and consolidate grounds 4, 5, and 6. In support of the first ground of appeal, the Appellant submitted that the Respondent violated section 234(2) (b) of the Criminal Procedure Act, Cap. 3 20 R.E. 2022 (herein after, the "CPA") when it altered the charge sheet while PW1, PW2 and PW3 had testified and without clearly stating the reasons for such alteration. He complained that PW1, PW2, and PW3 were not recalled and the trial court erred for not informing the Appellant of his right to have the witnesses recalled and examined as reflected on pages 19 and 20 of the proceedings, citing the case of Balole Simba v. R., Criminal Appeal No. 525 of 2017, the decision of the Court of Appeal on page 8. He contended that failure to comply with section 234(2)(b) of the CPA renders the evidence of PW1, PW2, and PW3 valueless citing the case of Ezekiel Hotay v. R., Criminal Appeal No. 300 of 2016 which was cited with approval in the case of Balole Simba (supra). The Appellant argued that apart from the evidence of PW1, PW2 and PW3, there is no evidence that can justify his conviction as the evidence of PW4 is insufficient and is based on hearsay. He stated that Exhibit P2 (PF3) only establishes that PW2's anus was penetrated but it does not prove that it is the Appellant who had carnal knowledge of PW2 against the order of nature. 4 On the second ground, the Appellant contended that the trial court relied on the evidence of a child of tender age in violation of section 127(2) of the Evidence Act, Cap. 6 R.E. 2022 (herein after, the "the Evidence Act7"). He submitted that giving promise to tell the truth and not lies before the court is a condition precedent for admissibility of evidence of the child of tender age. He stated that the trial court's proceedings reveal on page 10 that on 05/09/2022, the evidence of PW2 was received without oath or affirmation but the trial court made a finding that PW2 did not know the meaning of oath but he promised to speak the truth and not lies. He stated that the trial court was required to impose question to PW2 to test his competence, and that the promise to speak the truth did not come from the mouth of the victim but stated by the court, citing the case of John Mkorongo James v. R., Criminal Appeal No. 498 of 2020 on page 10 to 12 of the decision. The Appellant argued that, since the evidence of PW1 was taken illegally, his evidence has no value citing the case of Emmanuel Masanja v. R., Criminal Appeal No. 394 of 2020 and Ramson Peter Ondile v. R., Criminal Appela No. 84 of 2021 which were cited in the 5 case of Hamimu Yunus v. R., Criminal Appeal No. 293 of 2019 on page 16 of the judgement. In the third ground, the Appellant

complains about the variance of the charge which states that the place of commission of the offence was Someli in Sombetini Ward but PW1 and PW2 on page 9, 10 and 11 of the proceedings testified that it was Sombetini Ward without specifically stating that the exact location in Sombetini Ward. The Appellant stated that PW4 testified that he visited the place of commission of the offence and drew a sketch of Someli area without specifying it was in Sombetini Ward. The Appellant contended that the Respondent ought to have amended the charge under section 234(1) citing the case of Godfrey Simon and Another v. R., Criminal Appeal No. 296 of 2018 which cited with approval the case of Bainth and Another v. R., Criminal Appeal No. 339 of 2013 which held that an omission to amend the charge to remedy variance between the charge and evidence occasioned failure of justice. In support of the fourth, fifth and sixth grounds, the Appellant submitted that it was wrong for the trial court to rely on the evidence of PW2 without passing the test of truthfulness. He stated that if PW2 was sodomized twice, 6 in December 2021 and February 2022, he was expected to report the incidence to someone or to his grandmother because there was no threat as PW2 was not living with the Appellant. According to him, the victim's failure to report the incidence casts doubt on his credibility even after being sodomized for the second time. He stated that PW2 failed to name the suspect at the earliest opportunity citing the case of Marwa Wangiti Mwita and Anither v. R., (2002) TLR 39. He contended that PW2's evidence is not corroborated as required under section 127(6) of the Evidence Act. The Appellant argued that there was no evidence that the Appellant was seen sodomizing PW2 but the trial court relied on PF3 while PW3 who gave the evidence was not competent, reliable and dependable as reflected on pages 16 and 17 of the proceedings. He stated that PW3 should have furnished necessary scientific criteria for testing his accuracy but failed to establish that the anal penetration was caused by cucumber, penis or finger citing the case of Titli v. Alfred Robert Jones, AIR 1934 ALL 273. He concluded that PW3's failure to prove his evidence empirically, he became as advisory character and not a scientific witness. 7 In respect of ground 7, the Appellant submitted that the trial court failed to critically consider and analyze evidence of the Appellant in arriving at its decision contrary to section 312 (1) of the CPA. The Appellant complained that he was prejudiced and was denied right to be heard contrary to the dictates of the Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time (herein after, the Constitution). On the eighth ground, the Appellant submitted that the prosecution failed to prove the offence against him because of the failure by PW2 to inform his grandmother that he was sodomized at the earliest opportunity immediately upon the latter's return, which means that the evidence relied by the trial court to convict the appellant was not credible, truthful and reliable, citing the case of Marwa Wangiti Mwita (supra). He concluded that the prosecution failed to prove the offence against the Appellant to the standard required by law. He prayed the appeal to be allowed. In opposing the first ground on noncompliance of section 234 (2) (b) of the CPA, Counsel for the Respondent stated that it is true as reflected on page 19 of the proceedings that the prosecution amended the charge sheet and 8 prayed for amendment under section 234 of the CPA where PW1, PW2 and PW3 had already testified. She stated that it is true that after the charge was read over to the appellant and the appellant entering plea, the court did

not address the Appellant that under Section 234 (2) (b) of CPA, the prosecution witnesses who had tendered their evidence may be recalled in order to give their testimony afresh or for cross examination. Counsel argued that irrespective of the fact that the trial court did not address the same to the appellant, section 234 (2) (b) of CPA imposes an obligation to the accused person to request the witnesses to be recalled. She contended that as the Appellant did not do so, it is clear that he did not want the witness to be recalled. Counsel submitted that, if this court finds that failure by the trial court to address the Appellant under section 234 (2) (b) of the CPA prejudiced the appellant, she prayed for the Court to consider ordering a retrial from the stage where the Appellant was not addressed by the trial court, referring to the case of Omari Juma Lwambo v. R.z Criminal Appeal No. 59 of 2019, where the Court of Appeal decided to order retrial where there was sufficient evidence to prove the offence. Counsel submitted that, in the 9 circumstance of the prosecution case, apart from the alleged procedural error committed by the trial court, the evidence of the prosecution is sufficient to prove the offence against the Appellant. She contended that the evidence of the victim (PW2) whose testimony is on page 10 to 11 of the proceedings, sufficiently establishes that the Appellant sodomised the victim, and how the Appellant scared the victim that if he tells anyone, he will kill him. Counsel submitted that the evidence of PW2 is corroborated by PW1 who was the victim's mother, and who testified how she got information of his son being sodomised and that the victim named the Appellant as the perpetrator of the offence. She submitted further that there is evidence of PW3, a doctor who attended the victim, whose testimony is found on page 15 to 12 of the proceedings where he testified that there were all elements to prove that the victim was being sodomised. She concluded that the evidence of PW1 was corroborated by PF3 admitted in court as Exhibit Pl. In respect of the second ground, Counsel stated that the testimony of the victim on page 10 of the proceedings, reveal that the evidence was taken without oath but after he promised to tell the truth and not lies which establish that section 127 (2) of the Evidence Act was complied. She stated that the evidence of the victim was taken without oath and was taken after the victim had promised to tell the truth in accordance with the law, referring to the case of Kastuli Charles @ Akonaay v R, Criminal Appeal No. 414 of 2020, on page 12 and 13. In opposing the third ground, Counsel submitted that there is no any variance between the charge and the evidence of the prosecution. She contended that in the charge sheet, the prosecution have been specific that it was in Someli Area in Sombetini Ward but the prosecution witnesses spoke generally of the Ward and not a specific area. She stated that the fact that the witnesses did not mention a specific area does not mean that there are variances between the evidence of the prosecution and the charge. She concluded that the Appellant was not denied the right to understand the area of commission of the offence for him to defend the charge against him. In respect of the fourth, fifth and sixth grounds of appeal, Counsel argued that PW2's failure to state what happened to him at the earliest opportunity does not disprove the fact that PW2 was sodomised and that the victim was a credible witness. She submitted that to give or not to give information on the crime at the earliest opportunity depends on circumstances of each case, where in this case, the evidence of PW2 was clear that the Appellant scared to kill the victim if he dares to tell

anyone. She concluded that, in such circumstances, the victim would be scared to give information of the offence at the earliest opportunity. In respect of the seventh ground, Counsel stated that, on page 10 of the judgment, the trial court clearly evaluated the evidence including that of the defence. But if the Court finds that the trial court did not properly evaluate the evidence before making the decision, the Court has powers to evaluate the evidence. Opposing the last ground, Counsel reiterated her submissions in response to the Appellant's first ground of appeal and concluded that the prosecution proved the offence beyond reasonable doubt by considering the evidence of the victim which is corroborated by the evidence of PW1 and PW3. Counsel prayed for dismissal of the appeal. 12 Having heard the rival submissions of the Parties, I am set to determine whether the conviction and sentence of the Appellant by the trial court was proper and correct both in law and fact. I will start to determine the first ground of appeal. The Appellant complains that he was not informed of his right to require recalling PW1, PW2 and PW3 for giving evidence afresh or for cross examination, upon the prosecution's amendment of the charge under section 234(1) of the CPA. Counsel for the Respondent conceded that PW1, PW2, and PW3 were not recalled, but she viewed that under section 234(2)(b) of the CPA, it is the Appellant who was required to make such a request to the court. In the alternative, Counsel prayed for an order of retrial as the prosecution has managed to prove the offence against the Appellant beyond any reasonable doubt. Section 234(1) and (2) of the CPA provides: 234 .-(1) Where, at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition 13 of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall seem just.

- (2) Subject to subsection (1), where a charge is altered under that subsection-
 - (a) the court shall thereupon call upon the accused person to plead to the altered charge;
 - (b) the accused person may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross examined by the accused person or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination I have read the trial court's proceedings on page 19 and 20. It is true that upon being allowed to amend the charge on 22/11/2022, the Appellant 14 entered a plea of not guilty whereby, the trial court proceeded to hear PW4. The amendment was in respect of substitution of the name of the Appellant from the name Kelvin Wilfred, and the date of commission of the offence from 30/02/2022 to 28/02/2022. At the time of the amendment of the charge, the Respondent had its witnesses, PW1, PW2, and PW3, heard by the trial court. It is true from the record that the Appellant was not informed by the trial court of his right to require the witnesses or any of them to be recalled to give evidence afresh or be further cross examined. I am of the considered view

that, upon amendment of the charge under section 234(1) of the CPA, the trial court ought to have informed the Appellant his right to demand the prosecution witnesses, PW1, PW2 and PW3, to be recalled in order to give fresh evidence or to be further cross examined as required by section 234(2) (b) of the CPA. It is clear from the record that the trial court did not inform the Appellant of his right to demand PW1, PW2 and PW3 to be recalled, contrary to section 234(2)(b) of the CPA. I find the trial court's omission to inform the Appellant on his right to demand recalling of the PW1, PW2, and PW3 after substitution of the charge a fatal irregularity which vitiates the proceedings of the trial court. I hereby nullify 15 the proceedings of the trial court, with a consequence that both proceedings and judgement of the trial court are quashed and the sentence is set aside. I am guided by the decision of the Court of Appeal in the case of Omari Juma Lwambo (supra) where in the said case, among other irregularities, the trial court did not inform the accused of his right to require recalling of the witnesses. On page 9 of the decision, the Court held: - 'The above being the effect of a failure by a trial court to comply with s. 234 (1) and (2) of the CPA after substitution or alteration of a charge, we similarly find that, in this case, the omission rendered the proceedings which followed after the date of substitution of the charge, a nullity. In the exercise of the powers of revision vested in the Court by s. 4(2) of the AJA therefore, we hereby nullify those proceedings. As a consequence, the judgement of the trial court as well as the proceedings and the judgement of the High Court are hereby quashed.' 16 Upon quashing the proceedings and judgement of the trial court, I now turn to determine, whether the circumstance of the case necessitates an order for retrial. I find merit in the Appellant's complaint that the evidence of the victim, PW2, was taken in contravention of section 127(2) of the CPA. I am not convinced with the argument of the Counsel for the Respondent that it was sufficient for the court to establish that although PW2 did not understand the meaning of oath, he promised to tell the truth and not lies, referring to the case of Kastuli Charles (supra). I have noted from page 9 of the proceedings that the trial magistrate did not indicate the witness's promise but made the following observation: 'The witness herein is a child, only 8 years of age. He don't know the meaning of an oath but he promise to speak the truth and not lies' The above observation of the trial court show that the court examined the witness who did not understand the meaning of oath but who promised to tell the truth and not lies, but it did not record the promise made or spoken by the witness. What is seen in the record is an observation of the court. 17 The trial court failed to record in the witness's own words that he promises to tell the truth and not lies. I hold that the trial court failed to comply with section 127(2) of the Evidence Act as expounded in Edmund John @ Shayo (supra) which on page 15 of the decision, it was held: - 'Thereafter, the court recorded the testimony of PW4. In the reproduced excerpt above, the Court does not seem to make any finding regarding whether or not PW4 understands the meaning of an oath or affirmation and whether he has promised to tell the truth and not tell lies, I/l/e have observed that there is an absence of any record of there being any test conducted by way of simple questions from the trial court to PW4 in line with what was expounded in the cases cited above, Geoffrey Wilson (supra) or Issa Salum Nambaluka (supra)' The case of Kastuli Charles (supra) cited by the Counsel for the Respondent is

distinguishable with the present case. In the Kastuli's case, the Appellant complained that the child was not asked simple questions to ascertain the manner in which her evidence would be taken. In this case, the trial court did not record the witness's promise to tell the truth and not lie. My observations are fortified by the holding of the Court of Appeal in the case of John Mkorongo James v. R., Criminal Appeal No. 498 of 2020 [2022] TZCA 111 (11 March 2022; TANZLII) where the Court of Appeal held on page 13 that: - 'We have also observed that besides the omission or failure by the trial court to have first examined PW1 to test his competence and know if he understood the meaning and nature of an oath before jumping to the conclusion that PW1 would give unsworn evidence on the promise to the court to tell the truth, PW1's promise was incomplete and it was in form of an indirect or reported speech instead of a direct speech. It was incomplete because while section 127 (2) of the Evidence Act, require that the promise should be in telling the truth and not telling any lies, what PW1 is said to have promised is only to tell the truth. He did not promise not to tell any lies. It is recommended that the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete. '[Emphasis added] 19 Upon finding that the trial court omitted to record PW2's promise to tell the truth and not lie, the evidence of PW2 become inconsequential. I hereby expunge the evidence from the record. The complained variance between the charge and the prosecution witness PW1, PW2, and PW4 on the alleged failure by the witnesses to indicate specifically that the offence was committed at Someli in Sombetini Ward, has no merit. As long as the Someli is a place within Sombetini Ward, I find no variance between the charge and the prosecution evidence in respect of a place of commission of offence. With regard to the Appellant's complaint on the credibility of PW2, apart from my findings in respect of the second ground of appeal, I find that PW2 was credible and his evidence was intact. Although he did not complain to anybody or his grandmother immediately upon being sodomized twice, he was able to name the Appellant immediately upon being found by his teacher to have been unable to control his stool. PW2 was able to name the Appellant immediately upon being asked for the first time. His evidence before the court was consistency, reliable and without contradictions, where he was able to explain the places, the times, and the manner the Appellant sodomized him. PW2 was able to recognize and point out the Appellant in court. Another important aspect is the failure by the Appellant to cross examine PW1 and PW2 on their respective evidence. Guided by the holding of the Court of Appeal in the case of Nyerere Nyague v. R., Criminal Appeal No. 67 of 2010, on page 5 of the decision, I find that, failure by the Appellant to cross examine PW2 on the fact that he was the one who sodomized the victim, the Appellant is deemed to accept the fact and is estopped from asking the trial court to disbelieve the testimony. The Appellant's complaint that the trial court failed to analyze and consider his evidence has no merit. On page 10 first paragraph of the judgment, the trial court clearly evaluated and considered the evidence of the defence and concluded that the positive evidence of the prosecution case was credible and reliable. I have no reason to fault the trial court in this respect. 21 Upon expunging the evidence of the victim (PW2), the only evidence that linked the Appellant with the commission of the offence was that of PW2 which I have expunged. I find that the remaining evidence of PW1, the mother of the victim,

together with that of PW3, the medical doctor prove that the victim was raped. However, there is no remaining evidence to prove that it is the Appellant who raped the victim. The evidence of PW1 is based on hearsay evidence that she received from her son, the victim. It is trite law that the court cannot rely on hearsay evidence to find conviction. I am guided by the decision of the Court of Appeal in the case of Ndaisenga s/o Vicent v. R., Criminal Appeal No. 523 of 2021 [2023] TZCA 17299 (2 June 2023; TANZLII) where it held on page 16 that: 'After we have expunged the evidence of PW2 and PW3 which the prosecution relied upon so much and the learned trial judge found conviction upon it, the question now is whether the remaining evidence supports the charge of murder. Beginning with the evidence of PW1, his evidence is pure hearsay. The same goes to the evidence of PW6 that it is hearsay. It is trite law that the court cannot rely on hearsay evidence to find a conviction because it has no evidential value-see: Vumi Liapenda Mushi v. The n Republic, Criminal Appeal No. 327 of 2016 [2018] TZCA 197(12 October, 2018; TANZLII). The other evidence is that of the medical doctor, one Nebo Edson Mwamakamda (PW4) that established the deceased's death was due to unnatural cause but it does not connect the appellant with the charged offence of murder' In the final analysis, and upon I find the prosecution to have failed to establish the offence against the Appellant beyond any reasonable doubt. Based on the above, I find that the present appeal is not a fit case to order retrial. I find merit in the appeal and proceed to quash the trial court's conviction against the Appellant, set aside the sentence and order his immediate release from prison, unless he is held therein for any other lawful cause. It is so ordered. Right of Appeal fully explained. DATED at ARUSHA this 17th of November 2023. 23

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