

TANZANIA / JUDGMENT

Judgment Criminal Appeal No 19792 of 2024

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1 January 2024

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB REGISTRY AT
DAR ES SALAAM CRIMINAL APPEAL NO. 19792 OF 2024 (Appeal from the decision In the
Resident Magistrate Court of Kivukoni at Kinondoni given before (Hon. J.H Mtega -PRM) dated on
11th day of June,4 Originating from Criminal Case No. 162 of 2022) ENOS WILLIAM
MAKWEBA..... APPELLANT VERSUS THE REPUBLIC.....
.....RESPONDENT

JUDGMENT

MKWIZU,J The Appellant, Enos William Makweba, stood trial in the Resident Magistrate Court of Kivukoni at Kinondoni, facing the grave charge of Unnatural Offence under section 154(1)(a) and (2) of the Penal Code [Cap 16 R: E 2019]. The allegations against him were particularly distressing: on multiple occasions in March 2023, in the Mbezi Msakuzi area of Ubungo District, Dar es Salaam Region, he was accused of committing carnal knowledge against a vulnerable seven-year-old boy. Throughout the proceedings, the accused maintained his innocence, pleading not guilty. The prosecution called four witnesses and one key 1 exhibit, the PF3, to substantiate their claims. In contrast, the accused could only rely on his testimony as a sole witness. After thoroughly examining the evidence, the trial court determined that the Appellant was guilty of the offence, imposing a severe life sentence. Not content with the outcome, the Appellant has sought redress from this court, putting forth six grounds of appeal in his quest to overturn both the conviction and the sentence.

1. That the learned trial magistrate grossly erred in law to convict the appellant contrary to section 192(3) of the Criminal Procedure Act.
2. That the learned trial magistrate grossly erred in law and fact by convicting the appellant based on incredible visual identification.
3. That the learned trial magistrate grossly erred in law and fact by convicting the appellant based on incredible, tenuous, contradictory and uncorroborated evidence of prosecution witnesses.

4. That the learned trial magistrate grossly erred in law and fact by convicting the appellant based on the evidence of PW3(the doctor) who's evidence contradicted ex P1 PF3
5. The learned trial magistrate grossly erred in law and fact by convicting the appellant while the date of the incident was unknown. 2
6. That the learned trial magistrate grossly erred in law and fact by convicting the appellant based on a case that was not proved to the hilt. At the appellant's request, the hearing of this appeal proceeded in writing. The appellant, Enos William Makweba, appeared in person and was unrepresented, while the Respondent, the Republic, was represented by Mr. Charo, a learned state attorney. In his appeal, the appellant sought to introduce an additional ground, increasing the total to seven. He contended that the preliminary hearing breached section 192(3) of the Criminal Procedure Act. During the preliminary hearing on 25 July 2023, a memorandum of non-disputed and disputed facts was not recorded, and the appellant's signature was excluded in violation of section 192(3) of the Criminal Procedure Act, rendering the preliminary hearing a nullity. On the second ground of appeal, the appellant contends that the trial magistrate erred by convicting him based on unreliable visual identification. He pointed out that PW2 (the victim) testified to having first seen the accused at around 16:00 or 17:00 hours as he was returning home from school; however, the evidence failed to provide crucial details regarding the conditions under which the identification occurred, 3 neglecting to address the intensity of the light or its source. Furthermore, PW2 did not describe the appellant to his mother, PW1, nor did he indicate the time he spent observing the appellant or any distinctive marks or features that would facilitate a reliable identification, rendering the entire identification evidence insufficient to support a conviction. Reliance was made to the case BONIFACE SIWINGA V. Republic, Criminal Appeal No. 274 of 2007 (unreported). The same scenario occurred when the victim and his mother met the appellant during his visit with Mama Nuu. While PW2 states that the victim identified the appellant as the culprit on that date, no further evidence was presented to clarify how this identification happened. Again, while the evidence shows that PW2 was sodomised twice on September 11, 2023, and April 7, 2023, PW2 did not describe the appellant's appearance or attire in these two incidents. What is recorded is a general statement from the witnesses asserting that they identified the accused/appellant. He concluded that the evidence from PW1 and PW2 was insufficient to warrant the appellant's conviction visually identification. Regarding the third ground of appeal, the appellant claims a discrepancy in the victim's name. The offence records name the victim as JOVIN NEMENCI MRINGI, while PW1 refers to him as JOVIN SEMLINGA, and 4 PW2 swears that his name is JOVIN NERTES MLINGI. He cited Filbert Alphonse Machalo v. Republic, Criminal Appeal No. 528 of 2006 (unreported), arguing that these different names indicate different individuals and should have been treated as such in the proceedings. In the fourth round, the appellant argues that the trial magistrate erred in convicting him based on PW3's (the doctor's) testimony, contradicting Exhibit P.1 (PF.3), creating doubts favouring the accused. PW3's inconsistencies include his claim during the examination that the victim's anus showed attempted penetration, but during cross- examination, he stated the victim had

been sodomised. The appellant contends these contradictions were to be resolved in his favour. In the fifth ground of appeal, the appellant argues that the trial magistrate erred in law and fact by convicting him despite ambiguity regarding the date of the incident. The charge indicates that the offence was committed on various dates in March 2023 in the Mbezi Msakuzi area, yet PW1 testified that the victim was sodomised for the second time on April 7, 2023. PW3, the medical doctor, confirmed that he examined the victim on March 21, 2023, after the child was brought in with a PF3 for a medical assessment, claiming that the variation of evidence raises questions about the timing of the incidents, specifically, whether the assault occurred in 5 March or April. He pointed out discrepancies, noting PW4 testified to receiving the case file on March 28, 2023, and stated the accused was arrested on March 6,

2023. This raised confusion over how the accused could have had carnal knowledge of the victim again post-arrest. The case *Ryoba Mariba v. Republic*, Criminal Appeal No. 74 of 2023 (unreported) was cited to emphasise that the prosecution must provide clear evidence supporting the charges. He concluded that the prosecution failed to establish the required timeline of events. In his sixth ground of appeal, the appellant argues that the trial magistrate wrongfully convicted him due to insufficient evidence, underlying on the discrepancies between the charges and evidence. He points out that the victim (PW2) gave inconsistent testimony, initially claiming multiple acts of sodomy but later indicating he first saw the accused in a different situation, failing to establish allegations beyond a reasonable doubt. The appellant insists that the prosecution did not fulfil the burden of proof as outlined in *James Msumule @ Jembe and 4 others v. Republic*, Criminal Appeal No. 284 of 2021 (unreported). He requested the court to find merit in his appeal, overturn the conviction and sentence, and release him from custody. 6 The respondents support the appeal, asserting that at the preliminary hearing on 25 July 2023, the trial court failed to comply with Section 192(3) of the Criminal Procedure Act, which mandates a memorandum of agreed matters be prepared, read to the accused in understandable language, signed by the accused and their advocate, and filed appropriately. The respondents assert that the trial record shows no such memorandum was prepared or explained, violating legal requirements. The cases of *Hamimu Hamisi Totoro Zungu Pablo vs Republic*, Criminal Appeal No. 170 of 2004 (unreported) and *Republic vs Abdallah Salum @ Haji*, Criminal Revision No. 4 of 2019, (Unreported) were cited to the point underlining that procedural irregularities in preliminary hearings are fatal and incurable. The court was, therefore, requested to nullify the preliminary hearing proceedings and order a new trial from that point onward stage. The respondent argues that PW2's identification of the appellant was valid despite no detailed description of the appellant's appearance or clothing. She cited *Waziri Amani v. R* (1980), stating that PW2 identified the appellant while visiting the crime scene with PW1 and again in court. He deemed the identification robust, noting it occurred in the late afternoon with good visibility. PW2 testified that the appellant sodomised him multiple times, further confirming the reliability of his identification. 7 On the third and sixth grounds of appeal related to the discrepancy in the victim's name, which is purportedly referred to in the particulars of the offence as Jovin Memenci Mringi, the

appellant asserts that this name is incorrect. The accurate name, as identified in the evidence presented, is Jovin Nemenci Mlingi. While admitting the victim was referred by different names in the evidence, the learned state attorney argue that, despite these variations, all names refer to the same individual, the victim in the present appeal, and that any discrepancies arise merely from human error. He relied on *Filbert Alphonse Machalo v. Republic*, Criminal Appeal No. 528 of 2006 (unreported), in which the court concluded that differences in names did not sufficiently prejudice the appellant to create any reasonable doubt regarding the prosecution's evidence. On the same grounds, the state attorney argues that the prosecution side proved its case beyond reasonable doubt. They called four witnesses who are PW1 (The victims mother), PW 2 (The victim), PW3 (The doctor who examined PW 2 and PW4 (The police officer who conducted the investigation). PW1 evidence is on how she discovered that PW2 had been sodomised and that PW2 unequivocally identified the appellant as the perpetrator. She reported the incident to the police and ensured PW2 received a medical examination at Kimara Hospital. PW2 corroborated this account, detailing four instances of sexual 8 acts by the appellant and identifying him without hesitation. PW3, the examining doctor, supported this testimony by noting bruising and looseness in PW2's anus, confirming that the act occurred. He restated the legal principle that the victim's testimony is the best evidence in sexual offences, as stressed in *Suleiman Makamba v. R*

[2006] TLR 379, and that a minor's testimony can support a conviction without corroboration, according to Section 127(6) of the Evidence Act, Cap. 6 R.E. 2022, stressing that penetration and age were proved as the key elements in this case. Addressing the alleged contradictions in PW3's testimony, she said admitted the variance in PW3's where he mentioned attempted penetration and later penetration but to her, such a pointed contradiction did not constitute a contradiction, as his examination revealed bruising and looseness in PW2's anus, thus confirming penetration. This evidence was corroborated by PW2. He cited *Dickson Elia Shapwata v. Republic*, Criminal Appeal No. 242 of 2010 (unreported), *Deus Josias Kilala v. R*, Criminal Appeal No. 19 of 2018 (unreported), and *Said Sadick Said v. R*, Criminal Appeal No. 2246 of 2024 noting that when evaluating discrepancies, courts should consider the context rather than isolated sentences. He believes that the prosecution established the 9 required standard by proving the victim's age, the occurrence of penetration, and the appellant's involvement in that act. Responding to the complaint on the variance of the charge and evidence on the date of commission of the offence, the learned state attorney said no specific date of commission of the offence was mentioned because the incident was reported in March 2023 after the victim's mother discovered that PW2's anus was loose and confessed to her that he was indeed sodomised. She reverted back to the principle established by the law that in all trials, regular contradiction discrepancies occur in the testimonies of witnesses due to normal error of observation or errors of observation or errors in memory due to lapse of time or due to mental disposition explained in *Deus Josias Kilala V. R*, Criminal Appeal No. 19 of 2018 and *Said Sadick Said V. R*, Criminal Appeal No. 2246 of 2024 (All unreported).

She finally prayed for the dismissal of the appeal. Rejoining on grounds 3 and 6 The appellant argues that the prosecution's failure to identify the victim correctly leads to confusion among the three different names listed, suggesting they refer to three distinct individuals. On the fourth ground of appeal, he asserts that the prosecution must prove its case beyond a reasonable doubt. Any ambiguity regarding whether the victim was attempted to be penetrated 10 or sodomized should benefit the appellant. He contests the assertion in the respondent's submission regarding PW2's identification of the appellant, citing PW2's statement that he recognises a person by face but not by name, which undermines the certainty of the identification stressing on his earlier submission that PW2 failed to provide further descriptions of the appellant, such as attire or distinctive marks, during any of the alleged incidents. He insisted that conviction would be improper based on the weaknesses in the prosecution's evidence. He urges the court to recognise these deficiencies, asserting that they warrant merit but do not necessitate a retrial, as this would give the prosecution an opportunity to rectify its shortcomings. He concluded by requesting that the court grant his appeal, quash the conviction, set aside the sentence, and order his release from prison. I have reviewed the grounds of appeal and the trial court's records. The first ground is on the violation of Section 192 of the Criminal Procedure Act, which mandates that the court conduct a preliminary hearing when the accused has entered a plea of not guilty. In this section, the prosecution presents facts to identify those that are undisputed, aiming to expedite the trial and reduce the expenses of summoning witnesses for 11 facts that are not contested. According to Section 192(3), the court must prepare a Memorandum of any undisputed facts that exist. This memorandum must be explained to the accused in a language he understands, and it should then be signed by both the accused and the prosecution. The importance of this procedure was well stated in *Joseph Munene & Another Vs. Republic* [2005] T.L.R 141, "we opined that a preliminary hearing was intended by the legislature not only to reduce the costs of criminal trials in the country but also to ensure that trials are, without prejudice to the parties, conducted expeditiously. We equally found that proceedings which were conducted without invoking the procedure laid down under section 192 of the CPA were not vitiated." In this case, the preliminary hearing was conducted on July 25, 2023, where the charge was read, and the accused pleaded not guilty. The state attorney presented facts recorded by the trial magistrate, but there was no request for the accused to state agreed facts. The trial court noted agreed matters as "nil," while the state attorney and magistrate signed, the accused's signature was absent contrary to the requirements in Section 192 of the Criminal Procedure Act (CPA), supporting the first appeal ground. I thus agree with the appellant and state attorney that the PH was improperly conducted. 12 The critical issue that follows is whether this omission is significant enough to affect the case outcome. The answer is no for three main reasons. First, neither party agreed upon the facts; therefore, whether or not the memorandum was signed made no practical difference as all the narrated facts needed proof. Second, the trial proceeded as normal, with the prosecution presenting four witnesses, introducing the PF3 evidence, and allowing the appellant to cross-examine these witnesses. This shows that the appellant

had a full opportunity to defend himself against all the facts and allegations levelled against him by the prosecution. Thirdly, there is no evidence suggesting that the omission prejudiced the appellant. He did not substantiate how it harmed his case. This view aligns with previous cases, such as *Director of Public Prosecutions v. Jaba John* Criminal Appeal No. 206 of 2020, *Mwita Nyamhanga Mangure v. R*, Criminal Appeal No. 130 of 2015, and *Hassan Said Twalib v. R*, Criminal Appeal No. 95 of 2019, where similar issues were addressed and the court conclusion was that although the preliminary hearing process was irregular, it did not compromise the fairness of the trial or the appellant's ability to defend himself. Consequently, the first ground of appeal does not justify a reversal of the conviction. The remaining grounds of appeal raise one significant issue: the legality of the conviction based on the prosecution's weak and contradictory evidence. It is on the records that the appellant was arraigned for unnatural offence contrary to section 154 (1) and (2) of the Penal Code (*supra*), which is categorical that:

- (1) Any person who-
 - (a) has carnal knowledge of any person against the order of nature;
 - (b) has carnal knowledge of an animal; or
 - (c) permits a male person to have carnal knowledge of him or her against the order of nature commits an offence and is liable to imprisonment for a term of not less than thirty years.
 - (2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment
- In fulfilling my duties as the first appellate court, I will examine the records to determine all the remaining grounds collectively, which will answer the issue of whether the offence was proved beyond reasonable doubt. The prosecution case in this scenario, so to say, depended much on the credibility of witnesses and identification evidence. PW1, the victim's mother, testified about her discovery of the assault on her son, the victim. On or around March 20, 2023, she found the victim in a kanga dress sitting on a mat (mkeka) doing his homework and noticed that his kanga had shifted, exposing his open anus. Concerned, she questioned him, and after several attempts, he disclosed that someone had sodomised him. She reported the incident to the Mbezi Gogoni Magufuli Police Station, where the victim mentioned being threatened by the perpetrator, whom he recognised but could not name. A medical examination confirmed the sodomy, showing the victim was HIV-negative. On April 7, 2023, when the victim was sodomised again, PW1 and her son identified the alleged perpetrator. Although the accused fled when recognised, a third party, Mama Nu, assisted in locating him and facilitated his visit to the victim's home. There, the victim identified him as his attacker, leading to the suspect's arrest by the police. On his party, Pw2, the victim gave concise evidence. He shared his experience of returning home alone from school around 4:00 or 5:00 PM after attending evening tuition classes. He recounted an encounter with a man who initially greeted him and asked if he liked money. When 15 declined, the man made inappropriate advances, exposing himself and sexually assaulting him by penetrating him

multiple times. The victim expressed awful feelings about the situation. He explained that his mother noticed his change after one incident and inquired about it. However, he hesitated to disclose the identity of the assailant, stating he could only recognize the man by his face, as the perpetrator had threatened to kill him if he revealed what happened. The victim identified the accused in the courtroom as the man who sodomised him four times. As stated, the pressing issue is determining whether sodomy was committed and who exactly committed it. There is no doubt that Pw1, the mother, had no initial information on who perpetrated the sodomy against her son. Given the inherent nature of the offence, where typically only two individuals are involved, as in this case, the testimony of the victim or complainant is crucial. Thus, the explanation regarding the identity of the perpetrator could only come from the victim. This is the position in *Onesmo Laurent @ Salikoki Vs. Republic*, Criminal Appeal No. 458 of 2018, Court of Appeal at Moshi, the Court observed at page 12, this; “..... we are cognizant that in view of the inherent nature of the offence of rape or any other sexual offence where only two persons are usually involved when it is committed, the testimony of the 16 complainant is very crucial and must be examined and judged cautiously. Indeed, in this context, we held, for instance, in *Selem ani M akum ba* {supra}, that the best proof of rape (or any other sexual offence) must come from the complainant. Consequently, the complainant's credibility becomes the most important matter for consideration” And *Godi Kasenegala Vs Republic*, Criminal Appeal no 10 of 2008 [TZCA Tanzlii] on page 11, where it was held: “...It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses, if they never actually witnessed the incident, such as doctors; may give corroborative evidence” Upon close examination of the testimony of PW2, it becomes evident that while he confirms he was a victim of sodomy, his account lacks essential details regarding the identity of the perpetrator during the commission of the offence and any time thereafter and the manner of identification before the accused's arrest. In this instance, the victim was expected to explain how he identified the accused at the time of the incident, providing distinctive features, physical descriptions, or clothing details description as explained in *Boniface Siwanga V. Republic* (supra), and *Marwa 17 Wangiti Mwita & Another v. Republic* [2002] TLR 39 . In this later case the court was specific to the point that: “The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry.” Lack of clarity in Pw1 and PW2's evidence on how the appellant was connected to the alleged sodomy raises doubts about the accuracy of PW1's assertions and whether the individual identified in court is indeed the same person who assaulted the victim. Although PW1's testimony seems compelling, showcasing her efforts to apprehend the offender, it is notably devoid of supporting evidence from PW2, who directly experienced the assault. PW1 claims the accused was identified and arrested following the second instance of sodomy, yet PW2 contradicts this by stating he was assaulted four times before the accused's arrest, thereby questioning the reliability of the identification process. The learned state attorney's reliance on the timing and frequency of the offence to support a proper identification is misguided. The evidence presented regarding timing does not effectively align with the moments of the

reported sodomy. Furthermore, PW2 had no opportunity to identify 18 his assailant before the arrest except during a dock identification, which is legally insufficient. Given the serious nature of this offence, which involves a direct relationship between the victim and the perpetrator, conducting a formal identification parade was essential. Such a procedure would have allowed the child victim, who had no prior knowledge of the accused, the opportunity to identify the assailant accurately. The prosecution's account of the accused's arrest significantly supports defence evidence. Conspicuously, it is acknowledged that the accused voluntarily approached the victim's mother, PW1, after overhearing her call for him. Despite this direct interaction at PW1's residence, there was a glaring absence of procedural safeguards to facilitate the victim's identification of the accused, particularly in the presence of Mama Nuu, who was reportedly with the accused that day. Moreover, Mama Nuu, who is mentioned as having facilitated the arrest of the accused, was not called to corroborate PW1's evidence in court, leaving the entire evidence in shambles without a link between the alleged crime and the accused's culpability. The above findings defeat the general principle as per the case of *Goodluck Kyando v. R*, (2006) T.L.R. 363 that every witness is entitled to credence and belief unless there are good and cogent reasons to disbelieve him. The reasons in this case are clear. 19 The evidence identifying the accused is insufficient and ambiguous. The key issue is the uncertainty around the victim's identification of the accused, which undermines the credibility of their testimony and PW2's corroboration. Without a strong identification from the victim, the prosecution's case is compromised. Credibility relies on reliable evidence, and the lack of a consistent identification process raises doubts about the testimony's integrity. In criminal law, the prosecution has a paramount responsibility to establish not only the commission of the alleged offence but also to prove the guilt of the accused beyond a reasonable doubt. This obligation encompasses the necessity of connecting the accused directly to the crime, ensuring that all elements of the offense are substantiated with clear and unequivocal proof. In the case of *Mariki George Ngendakumana Vs Republic* Criminal Appeal No. 353 of 2014 CAT at Bukoba (Unreported) that - "It is the principal of law that in criminal cases, the duty of the prosecution is in two folds, one, to prove that the offence was committed and two, that it is the accused who committed it." [Emphasis added] In *John Makolobela Kulwa Makolobela & Another alias 20 Tanganyika Versus Republic* (2002) TLR 296, the court held "A person is not guilty of a criminal offence simply because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which established his guilty beyond reasonable doubts" Although there is, in this case, sufficient evidence of the committed sodomy, the prosecution in this case has failed to establish who exactly was involved in that sodomy. Based on the analysis above, I am satisfied that the prosecution failed to prove the case to the required standard to support the appellant's conviction. The appeal is thus meritorious. It is allowed with an order to have the appellant released from prison unless otherwise held for other lawful purposes. DATED at DAR ES SALAAM, this 7th MARCH 2025 E.Y. MKWIZU JUDGE 21 22

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Prepared on 14 October 2026 · Esheria