IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 181 OF 2018

HEMEDI OMARY ALLY @ DALLAH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania Dar es Salaam District Registry at Dar es Salaam)

(Magoiga, J.)

Dated the 27th day of June, 2018

in

Criminal Appeal No. 381 of 2017

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JUDGMENT OF THE COURT

26th August & 13th November, 2020

KOROSSO, J.A.:

This is the second appeal by Hemedi Omary Ally @Dallah (the appellant) having been aggrieved by the decision of the High Court of Tanzania at Dar es Salaam (Magoiga, J.) dated 27th June, 2018 in Criminal Appeal No. 381 of 2017. The High Court decision upheld the decision of the District Court of Temeke at Temeke that convicted the appellant on a charge for which he was arraigned that is, Unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code Cap 16 Revised Edition 2002 (the Penal Code). The appellant was upon conviction sentenced to thirty years imprisonment which was substituted to life imprisonment by the High Court on the first appeal.

It was alleged at the trial that on the 26th September, 2016 at Mbagala Mission area within Temeke District in Dar es Salaam Region, the appellant did have carnal knowledge against the order of nature to a boy aged five years whom we shall henceforth refer to as the "victim" or "PW1" to protect his identity.

The background to this appeal drawn from the prosecution case who paraded four (4) witnesses and one exhibit to prove their case can be narrated in brief as follows: The appellant was known to PW1 prior to the incident subject to the charges against the appellant. On the 26th September, 2016 while at the house of his aunt one Saida Omary (DW3), PW1 was called by the appellant. He heeded to the call and the appellant took him to an unfinished house, where he undressed him, ordered him to lay down on his stomach and had his way with him against the order of nature. That is, the appellant inserted his male organ into PW1's anus while covering PW1's mouth with his hands. After the appellant completed the act, he put on his clothes and threatened PW1 not to tell anyone on what had transpired or otherwise risk being killed, and then left. Soon after, PW1 put on his clothes and went to his sister where he narrated what had transpired. The sister called and informed DW3 on what had transpired, which led to information

reaching PW1's father, Waziri Seif Lunda (PW3). Subsequently, PW1 was taken to the police station to report and to the hospital for medical examination and treatment. At the hospital PW1 was examined and treated by Abrahaman Malifedha Kavishe (PW2). PW3 traced the appellant and found him at Mbezi area and took him to a police station where he was arrested and later arraigned in court as expounded above.

The appellant's defence was that of total denial of any involvement in the incident that led to the charges against him stating that on the fateful day he was not at the alleged scene of crime but in Mbezi taking part in the construction of a house, the place where he was found by PW3 and later taken to the police station and arrested. His defence was supported by the testimonies of two of his witnesses, that is, DW2 and DW3 who stated that on the fateful date of incident the appellant was not at his home but at Mbezi.

At the end of the full trial, the appellant was convicted and sentenced to serve thirty years imprisonment. In the conviction of the appellant, the trial court relied on the evidence of PW1 finding it was corroborated by the oral evidence of PW2 especially on the fact that the male organ of the appellant penetrated the PW1's anus, and that PW4's evidence did support the evidence on identification of the appellant as

the perpetrator of the sexual assault against PW1. The trial court discarded the defence of *alibi* stating that it was not proved and thus found that the prosecution side proved their case against the appellant to the standard required.

Dissatisfied with the decision of the trial court, the appellant's appeal to the High Court of Tanzania was unsuccessful, his appeal having been dismissed. The learned High Court judge found that the grounds of appeal lacked merit and that there was nothing to fault the manner the evidence of PW1 was recorded. He concurred with the trial court's finding that the recording of PW1's evidence was within the confines of section 127(2) of the Tanzania Evidence Act, Cap 6 Revised Edition 2002 (the Evidence Act). The High Court also concurred with the trial court's holding that PW1 was truthful, coherent and credible and that his evidence was duly corroborated by PW2 despite the fact that no corroboration was required since PW1 was found to have sufficient intelligence and understanding at the start of his testimony.

With regard to the defence of alibi, the High Court supported the finding of the trial court that it was an afterthought since *alibi* was raised after the closure of the prosecution case. It was further observed that in any case the said defence did not dent the prosecution case. The High

Court also rejected the defence of mistaken identity by relying on the prosecution evidence that the appellant was well known to PW1 prior to the incident. Having confirmed the conviction against the appellant, guided by the provisions of section 154(2) of the Penal Code, the High Court substituted a sentence of life imprisonment from that of thirty years meted on the appellant by the trial court.

The appeal before us has been preferred grounded by fourteen (14) grounds of appeal found in the Memorandum of Appeal filed on 19th September, 2018 and again on the 24th of August 2020 filing a Supplementary Memorandum of Appeal consisting of three (3) grounds of appeal. Again, on the 21st August, 2020 written submissions were filed by the appellant. In the filed written submissions and his oral narrations in this Court the appellant contended that the appeal will be argued relying on the filed supplementary grounds of appeal and thus prayed to abandon the grounds in the memorandum of appeal. This means that, this appeal is predicated on three grounds found in the Supplementary Memorandum of Appeal which are as follows:

1. THAT, the learned High Court judge erred in law in upholding the appellant's conviction founded on the evidence of PW 1 which was taken in contravention of section 127(2) of the Evidence Act.

2. THAT, the learned High Court judge erred in law in upholding the appellant's conviction while the prosecution did not prove the case against him beyond reasonable doubt.
3. THAT, the learned High Court judge erred in law and fact in basing the appellant's conviction on prosecution evidence while failed to consider the defence evidence.

At the hearing of the appeal, the appellant was unrepresented and appeared in person through video conferencing facility from Ukonga prison while the respondent Republic was represented by Ms. Dorothy Massawe, learned Senior State Attorney.

When called upon to amplify his grounds of appeal, the appellant had nothing further to add and prayed that his filed written submissions and the supplementary memorandum of appeal be considered and lead to his appeal being allowed.

With regard to the 1st ground of appeal, in his written submissions, the appellant challenged the High Court for upholding the conviction of the appellant which had relied on the evidence of PW1, a child of tender age without considering the fact that the said evidence was taken in contravention of section 127(2) of the Evidence Act. He argued that the trial court did not record that before testifying PW1

did promise to tell the truth and not to tell lies and thus contended that because this did not take place then PW1's evidence is flawed. That since PW1's evidence did not comply with the law and in the absence of any other evidence to prove the charges against him then the prosecution failed to prove their case. He contended that the remaining evidence from the other prosecution witnesses, that is, PW2, PW3 and PW4 is very weak, pure hearsay and lacked evidential value. He thus prayed for the ground to be allowed to the extent of quashing the conviction and setting aside the sentence and for him to be set free.

On the part of the learned Senior State Attorney, she commenced her arguments by stating that having gone through the proceedings and judgments of both the trial and the first appellate and discerning some procedural irregularities which are fatal, the respondent Republic's position was to support the appeal by the appellant. Thereafter she proceeded to respond to the grounds of appeal generally.

The learned Senior State Attorney advanced three reasons which led them to support the appeal. **First,** being the fact that they concurred with the appellant's contention that PW1's testimony was

recorded contrary to the law. She argued that section 127(2) of the Evidence Act provides for matters for consideration and to be complied with when taking evidence of a child of tender years. That from the record of proceedings it is indisputable that the trial court did not comply with the said provision and there was nothing on record to show requisite compliance and thus rendering PW1 evidence to be flawed. Our decisions in **Andrea vs Republic**, Criminal Appeal No. 94 of 2018 and **Tulizo Kakilo vs Republic**, Criminal Appeal No. 338 of 2017 (both unreported) were cited to augment this point.

Second, that the evidence of PW1 was not corroborated despite the fact that the trial court and the High Court on appeal found that PW1 evidence was corroborated by the evidence of PW2 on material factors related to the offence charged. The learned Senior State Attorney contended further that since the evidence of PW1 is flawed, then it was important for the trial and the first appellate court to seek for corroboration on material factors to prove the offence charged as stated in **Tulizo Kakilo vs Republic case** (supra). She argued that this principle was also discussed by this Court in **Godi Kasenegela vs Republic**, Criminal Appeal No. 10 of 2008 (unreported).

The learned Senior State Attorney argued further that despite the fact that PW2 evidence was strong, as an expert witness his evidence is just opinion evidence and such evidence alone without other evidence to prove the ingredients of the offence charged cannot fill any gaps left in evidence of a victim of sexual offences as it is well settled that the best evidence in such cases is that of the victim.

Third, that in the current appeal there was no other solid evidence to prove the offence charged against the appellant especially bearing in mind the fact that PW1's evidence was endowed with fatal irregularities. She argued that PW3's evidence does not add any weight to the evidence related to the offence charged against the appellant since it relates only on what he heard, was told or he suspected together with the role he played in the arrest of the appellant. That when the evidence of PW2 is considered, it was a report on his examination of PW1 after the alleged incident. His testimony was basically on his findings on the fact that the muscles in the anus were loose, the bruises found and whether or not there was penetration and it ends there, without stating who was the perpetrator. On the other hand, the evidence of PW4 is a step by step narration of the conduct of investigations upon receiving a report

of the incident that is, his issuance of a PF3, recording of witnesses' statements and what he heard from the witnesses. She then prayed that the appeal be allowed, conviction quashed and sentence set aside and that the appellant be set at liberty.

The appellant's rejoinder was very brief, in effect concurring with the submissions by the learned Senior State Attorney and also reiterating his prayers for the appeal to be allowed and he be set free.

Having heard the appellant and the learned Senior State Attorney and gone through the respective ground of appeal, the cited references and the record of appeal what is evident is that the mainstay issue for determination is the validity or otherwise of the evidence of PW1.

Indisputably, at the time of testifying in the trial court PW1 was a child of tender age. This fact can be drawn from a lot of factors, such as the fact that the trial court conducted a *voire dire* prior to recording her evidence as found at page 11 of the record of appeal. This is because by virtue of Section 127(2) of the Evidence Act, where a witness is a child of tender age, a *voire dire* has to be conducted. A *voire dire* being an examination conducted by a trial

magistrate or judge to ascertain whether the child possesses sufficient intelligence and understands the duty to speak the truth (see **Kisiri Mwita vs Republic** [1981] TLR 218 and **Nguza Viking @Babu Seya and Three Others vs Republic**, Criminal Appeal No. 56 of 2005 (unreported).

At the same time, PW2 at page 14 of the record of appeal informed the court that the victim he examined was five (5) years of age and his testimony was augmented by tendering the PF3 (Exhibit P1) whose contents also expounds that PW1 was five years of age. There is also the evidence of PW3 where although he does not reveal PW1's age at page 16 of the record when talking about PW1 he states: "... *I went back home together with my child....*".

Section 127(4) of the Evidence Act defines a child of tender age as:

> "*For the purpose of sub-section (2) and (3), the expression 'child of tender age' means a child whose apparent age is not more than fourteen years*".

At the same time, it is on record that the fact that PW1 was a child of tender age at the time of testifying in the trial court was proved and found to be a fact by the trial court and confirmed by the High Court.

Various decisions of this Court have tried to expound the import of section 127(2) of the Evidence Act, and it is well settled that in taking the evidence of a child of tender age, what should be done is provided under section 127(2) of the Evidence Act stating:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence promise to tell the truth to the court and not to tell lies".*

This Court in **Issa Salum Nambaluka vs Republic**, Criminal Appeal No. 272 of 2018 (unreported) when discussing the import of section 127(2) of the Evidence Act stated:

> *"A child of tender years may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In a situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies.".*

The Court in the above case also adopted what was held in the case of **Geoffrey Wilson vs Republic**, Criminal Appeal No. 168 of 2018 (unreported) that where a witness is a child of tender age, a

trial court should at the foremost ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. That if he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the respective religion professed by the child witness and if the child does not understand the nature of oath, the child witness should before testifying be required to promise to tell the truth and not to tell lies.

In the present case as found at pages 11-13 of the record of appeal, the Court having noted that PW1 is a child of tender years, decided that a *voire dire* must be conducted and proceeded to conduct the same.

For ease of reference we find it pertinent to reproduce what transpired in court.

> "***PROSECUTION CASE OPENS***
>
> *PW1: Name Arafat Wazuri, student of standard one.*
>
> *Court: this Court discovered that Pw1 is a child of tender years, so voire dire must be conducted.*
>
> ***VOIRE DIRE***
>
> *Court: what do you school and which class are you?*

Pw1: I am standard one at Ramadhani Primary School

Court: do you know the meaning of oath

Pw1: I don't know

Court: do you know when one did bad thing goes where and who did good thing goes where

Pw1: the one who does bad thing anakwenda kwa shetani and the one who does the good thing anakwenda kwa Mungu

Court: the witness does not know the meaning of oath but has sufficient intelligence to speak the truth. He testifies not on oath

Signed by Hon. Mfanga RM

22/3/2017"

Thereafter, Pw1 proceeded with his testimony while led by the Prosecution.

The above excerpt imported from the proceedings shows that at no time did PW1 promise to tell the truth as required by section 127(2) of the Evidence Act and as expounded by various decisions of this Court as already expounded hereinabove. Undoubtedly, the trial court recorded the evidence of the PW1 while disregarding the amendments to section 127(2) of the Evidence Act. The requirement for a witness of tender age to promise to tell the truth was introduced

by Act No. 2 of 2016 which amended section 127(2) of the Evidence Act which came into force on the 8th July, 2016. Therefore, the amendment was operational when PW1 testified in the trial court on the 22nd March, 2017.

In **Geoffrey Wilson vs Republic** (supra), the Court discussed the process to be taken when taking the evidence of a child of tender age and we observed, that a trial magistrate or judge depending on the circumstances obtaining can ask the witness of tender age simplified questions which may not be exhaustive but may relate to the age of the child; the religion which the child professes and whether he/she understands the nature of oath; and whether or not the child promises to tell the truth and not to tell lies.

In the appeal before us, we have gone through the *voire dire* session conducted of PW1 and it is clear its aim was to ascertain whether PW1 had adequate intelligence to testify and also understood the nature of an oath. Despite the fact that it is recorded that the court was satisfied that PW1 had sufficient intelligence to speak the truth, in our view this was not in line with the demands of the section under discussion in terms of what a child of tender years has to do, because in the trial court, PW1 did not promise to tell the

truth and not to tell lies. We thus agree with the learned Senior State Attorney and the appellant that the procedure undertaken to take the evidence of PW1 contravened section 127(2) of the Evidence Act was flawed. This leads to no other conclusion but that, the evidence of PW1 was improperly taken and the irregularity is fatal. In **Yusuph Molo vs Republic**, Criminal Appeal No. 343 of 2017 (unreported) the Court held:

> *"It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution case... If there was no such undertaking, obviously the provisions of sections 127(2) of the Evidence Act (as amended) were flouted. This procedural irregularity in our view, occasioned a miscarriage of justice. It was fatal and incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value, it is as if she never testified to the rape allegation against her..."*

Since the same situation has also compromised the evidence of PW1 in the current appeal, indisputably PW1 evidence is worthless. Consequently, we expunge PW1's evidence from the record.

Indeed, after expunging the evidence of PW1, we find that the evidence of the other prosecution witnesses which remains, by itself cannot sustain the conviction of the appellant. When considering the import of the evidence of PW3 and PW4 who were the other prosecution witnesses apart from PW1 and PW2 essentially is just hearsay evidence as regards the offence charged against the appellant. At the same time, when taken into totality, PW2's evidence together with Exhibit P1 (the PF3) stands alone and is not supported by any other evidence to support the offence charged against the appellant.

In the end, since the conviction of the appellant was profoundly based on the evidence of PW1 having expunged the said evidence and found that the remaining evidence was not sufficient to prove the case against the appellant, as rightly pointed out by the appellant and conceded by the learned Senior State Attorney, the prosecution side is left with no plausible evidence to have sustained the conviction against the appellant. In the premises, the 1st ground of appeal is allowed.

With the above finding, we are of the view that there is no need to pursue and determine the other two remaining grounds of appeal

since our holding on the first ground of appeal suffices to dispose the appeal. In the premise, for the foregoing reasons, the appellant's conviction is hereby quashed and the sentence set aside. We further order that the appellant be released from prison immediately unless he is otherwise held for other lawful purposes.

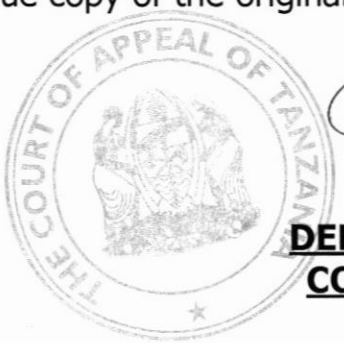
DATED at **DAR ES SALAAM** this 11th day of November, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 13th day of November, 2020 in the presence of the appellant in person through video conferencing and Mr. Adolph Verandumi, learned State Attorney for the respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL