IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 385 OF 2018

SELEMAN MOSES SOTEL @ WHITE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Dyansobera, J.)

dated the 5th day of September, 2018

in

Criminal Appeal No. 24 of 2018

JUDGMENT OF THE COURT

24th & 28th February, 2020

MWARIJA, J.A.:

This is an appeal against the decision of the High Court of Tanzania sitting at Mtwara (Dyansobera, J.) in Criminal Appeal No. 24 of 2018. That decision arose from Lindi District Court Criminal Case No. 101 of 2017. In that court, the appellant was charged with two counts under the Penal Code [Cap 16 R.E. 2002] (the Penal Code). In the 1st count, he was charged with the offence of rape contrary to sections 130(1), (2) (e) and 131(1) while in the 2nd count, he was charged with unnatural offence contrary to s. 154(1) (a) both of the Penal Code.

It was alleged that on divers dates in July and August, 2017 at Mpilipili area within the Lindi Municipality, in Lindi Region, the appellant committed the two offences against "F.S.H" a girl aged 10 years (hereinafter "the child").

The appellant denied both counts. After the trial, whereby the prosecution relied on the evidence of four witnesses and two documentary exibits while the appellant relied on his own evidence, the trial court was satisfied that the two counts had been proved beyond reasonable doubt. As a result, the learned trial Resident Magistrate proceeded to sentence the appellant to 30 years imprisonment in each count. The sentences were ordered to run concurrently. The appellant was also ordered to pay a compensation of TZS 5,000,000.00 to the child. Aggrieved, the appellant unsuccessfully appealed to the High Court hence this second appeal.

The facts giving rise to the arraignment and the ultimate imprisonment of the appellant can be briefly stated as follows: In August, 2017 the child's mother, Mwajuma Fakhi Hassan (PW1) noticed that the child had developed an unusual behaviour. Suspecting that she might not be attending school regularly, PW1 went to see the Head teacher of Stadium Primary School where the child was studying. PW1

was informed by the Head teacher that the child had poor school attendance record. On that information, PW1 went to seek assistance of the Mtaa Executive Officer (MEO) to find the possible cause of the child's behavioural change.

The MEO, Fatuma Kitenge (PW4) decided to arrange a meeting between her, PW1 and the Head teacher. According to the evidence of PW1 and PW4, the child admitted that she had been absenting herself from school and instead, used to loiter around engaging in sexual affairs with men. It was the evidence of PW1 and PW4 further that the child named the appellant as one of the persons who used to engage in sexual affairs with her.

Having gathered that information, PW1 reported the matter to the police where, upon being interrogated by the police, the child allegedly repeated the story which she narrated before PW4. The police took the child to hospital for medical examination. At the hospital, the child was examined by Dr. Aisha Abdul (PW2) whose evidence is to the effect that, upon her examination, she found that the child was not virgin and her annal muscles had become loose, indicating that she had been sodomized. After receipt of the child's medical report, the appellant was arrested and charged as shown above.

At the trial, the child testified as PW1. In her evidence, she averred that one day, while in the company of her friend, one Saida they went to the house of the appellant at Manyasi Nyanda area. Having entered into the house, the appellant took them to the bedroom and had a carnal knowledge of them in turn. In doing so, she said, the appellant started by penetrating her vagina and later sodomized her.

In his defence, the appellant exenorated himself from the charges. He testified that on 31/8/2017 at 22.00 hrs while at his home, some police officers arrived and arrested him without informing him of the cause of his arrest. He was taken to the police station where he was told that he had been having sexual affairs with school girls. According to him, he denied the allegation but the police proceeded to charge him with the two counts which he was convicted of.

In its decision, the trial court found that the prosecution had proved the two counts against the appellant beyond reasonable doubt. It basically relied on the evidence of PW3 which, according to the learned trial Resident Magistrate, although it was the only direct evidence, the same was credible. He indicated that he acted on that evidence after he had warned himself of the dangers of acting on such evidence of an independent witness of a sexual offence. In that regard, he was guided

by s. 127(6) of the Evidence Act [Cap. 6 R.E. 2002] as amended by the Written Laws (Amendment) (No. 2) Act No. 4 of 2016 (hereinafter "the Evidence Act"). He also relied on the decision of this Court in the case of **Selemani Makumba v. R**, [2006] TLR. 379.

On appeal to the High Court, the learned first appellate Judge upheld the findings of the trial court. He was of the view that the trial court correctly found that the evidence of PW3 was credible and that her evidence was corroborated by the evidence of PW2.

In this appeal, initially, the appellant raised two grounds; in which he essentially contended that the High Court erred in upholding the decision of the trial court which was erroneous for failure by the trial magistrate to properly conduct *voire dire* examination on PW3. That procedure is however, no longer applicable following amendment of s. 127 of the Evidence Act by Act No. 4 of 2016. Later however, he filed a supplementary memorandum of appeal which he termed it as "Amended Memorandum of Appeal." In the supplementary memorandum, the appellant has in effect raised three grounds of appeal:

1. That the learned High Court Judge erred in law in upholding the appellant's conviction founded on

the evidence of PW3 which was taken in contravention of s. 127(2) of the Evidence Act.

2. That the learned High Court Judge erred in law and fact in basing the appellant's conviction on the evidence of exhibits which were improperly admitted in evidence.

3. That the learned High Court Judge erred in law and fact in upholding the appellant's conviction while the prosecution did not prove the case against him beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent Republic was represented by Mr. Abdulrahman Msham, learned Senior State Attorney. When he was called upon to argue his appeal, the appellant opted to hear first, the respondent's submission in reply to his grounds of appeal and thereafter make a joinder, if necessary.

At the outset, Mr. Msham expressed the stance that the respondent was supporting the appeal. On the 1st ground, he agreed with the appellant that the evidence of PW3 was taken in contravention

of s. 127 (2) of the Evidence Act. He argued that the procedure which was adopted by the trial court of taking PW3's evidence on oath instead of giving promise to tell the truth and not to tell lies as required by s. 127(2) of the Evidence Act, rendered her evidence invalid. Citing the Court's decision in the case of **Selemani Bakari Malota @ Mpale v. the Republic**, Criminal Appeal No. 269 of 2018 (unreported), the learned Senior State Attorney submitted that the evidence of PW3 deserves to be expunged.

On the 2nd ground, Mr. Mshamu argued that PW3's birth certificate and her medical report (PF 3) were improperly tendered in evidence. According to the learned Senior State Attorney, the documents were tendered contrary to the laid down procedure that a document must be tendered by its author. Replying on the case of **Selemani Bakari Makota** (supra), Mr. Msham submitted that the documentary evidence; PW3's birth certificate and the P.F.3 which were admitted as exhibits A1, and A2 respectively should be expunged from the record.

With regard to the 3rd ground, the learned Senior State Attorney contended that, from his arguments on the 1st and 2nd grounds, he agreed with the appellant that the case was not proved beyond reasonable doubt.

The appellant was contended with the submission made by the learned Senior State Attorney and for that reason, he did not have anything useful to submit in his rejoinder rather than urging the court to allow his appeal.

We have duly gone through the record and the arguments made by the learned Senior State Attorney and the appellant. To begin with the 1st ground of appeal, as correctly submitted by Mr. Msham, PW3 who was the key prosecution witness, gave her evidence on affirmation. According to the proceedings of the trial court at page 19 of the record of appeal, the following is what transpired before the said witness gave her evidence:

> "PW3 [F.S.H.] Resident of Mchinga Road, Islam, standard 3 student at Stadium Primary School, 10 years, Makonde.
>
> **Affirmed and state** (sic)
>
> **Court**: The victim know (sic) the meaning of oath and she is competent to testify before this court."

It is clear from the above excerpt that PW3 understood the nature of oath and thus the decision by the trial court to take her evidence on

affirmation. With respect to the learned Senior State Attorney, we think the effect of the amendment to s. 127 of the Evidence Act was not to bar a child of tender age to give evidence on oath or affirmation. Following the amendment, s. 127(2) of the Evidence Act now provides as follows:

> *"127 – (1)....*
>
> *(2) A child of tender age may give evidence without taking oath or making affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."*

Our interpretation of this section is that the same having been couched in permissive terms, a child of tender age can give evidence on oath or affirmation or without oath or affirmation. – See the recent decisions of the Court in the cases of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018, **Hamisi Issa v. The Republic**, Criminal Appeal No. 274 of 2018 and **Issa Salum Nambaluka v. The Republic**, Criminal Appeal No. 272 of 2018 (all unreported).

In the latter case, we stated as follows:

" From the plain meaning of the provisions of sub-section (2) of s. 127 of the Evidence Act ... a child of tender age 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."

We wish to add here that, under s. 198(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA), it is mandatory that, in a criminal case, every witness has to give evidence on oath or affirmation unless by a written law, he is exempted from doing so. That provision states as follows:

" 198–(1). Every witness in a Criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."

Although therefore, s. 127(2) of the Evidence Act allows a child of tender age to give evidence without oath or affirmation, hence an

exception to the mandatory requirement of s. 198(1) of the CPA, that provision of the Evidence Act does not bar a child witness to the contrary.

It is clear from the amendment to s. 127 of the Evidence Act that the purpose was to do away with the old procedure of conducting *voire dire* examination on the child witness. That procedure was intended to ascertain first, whether the child understands the nature of oath and whether or not he or she has sufficient intelligence to justify reception of the evidence of a child witnesses. In our considered view therefore, in the present case, the trial magistrate acted properly in taking the evidence of PW3 on affirmation after the witness had been found to understand the nature of oath. From the wording of s. 127 (2) of the Evidence Act, it cannot be said that her evidence was improperly taken. Obviously, the provision is silent on the procedure which a trial court should apply to decide whether a child witness should give evidence on oath or affirmation or upon a promise to tell the truth and on undertaking not to tell lies. Addressing that lacunae, the Court had this to say in the case of **Godfrey Wilson** (supra).

> *"The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge*

can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case as follows:

1. *The age of the child.*
2. *The religion which the child professes and whether she/he understands the nature of oath.*
3. *Whether or not the child promises to tell the truth and not to tell lies."*

On the basis of the above stated reasons therefore, we find no merit in the 1st ground of appeal.

On the 2nd and 3rd grounds of appeal, the appellant complains that his conviction was based on insufficient evidence. To start with, we agree with both the learned Senior State Attorney and the appellant that the certificate of birth and the medical report of PW3 were improperly admitted in evidence because the same were tendered by the State Attorney who prosecuted the case. Indeed, a prosecutor is not competent to tender exhibits because he cannot be both a prosecutor and a witness at the same time. In the case of **Thomas Ernest Msungu @ Nyoka Mkenya v. R**, Criminal Appeal No. 78 of 2012 (unreported) the Court stated as follows on that principle:

"a prosecutor cannot assume the role of a prosecutor and witness at the same time. With respect, that was wrong because in the process the prosecutor was not the sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98(1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined."

The issue which arises however, is whether the irregularity had an effect on the oral evidence of PW1 who testified on the age of victim as well as that of PW2, who examined her. This takes us to the appellant's complaint that the prosecution did not prove the case beyond reasonable doubt.

As stated above, the appellant's conviction was based on the evidence of PW3 who was found by both lower courts to be the witness of truth. Apart from being the only eye witness the trial court relied on s. 127 (6) of the Evidence Act which states that:

" 127-(1) ....

(2) ....

(3) ....

(4) ....

(5) ....

(6) Notwithstanding the proceeding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

The two courts below found that the evidence of PW3 was itself sufficient to found the appellant's conviction. They relied on the case of **Selemani Makumba** (supra) in which the Court underscored the spirit of s. 127 (6) of the Evidence Act. In that case, the Court stated as follows:

" True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant that there was penetration."

In this case however, the evidence of PW3 did not stand alone. We agree with both the trial court and the High Court that her evidence was corroborated. Although as found above, her birth certificate was wrongly admitted in evidence, the effect of expunging it from the record did not affect the oral evidence of PW1 who testified that the victim was aged 10 years. That evidence was not disputed. Similarly, as regards PW3's medical report, apart from expunging the PF3, there is still the oral evidence of PW2 to the effect that, upon her examination, she found that PW3 was not virgin and that the muscles of her anus had become loose, showing that she had been penetrated by blunt object in both her vagina and anus. As observed by the learned first appellate Judge therefore, the evidence of PW1 and PW2 rendered corroboration to PW3's evidence.

In our considered view, after having found that the evidence of PW3 was properly taken on affirmation and after having found that the

same was corroborated by that of PW1 and PW2, we are of the settled view that the 2nd and 3rd grounds are also devoid of merit.

In the event, we find the appeal lacking in merit and hereby dismissed.

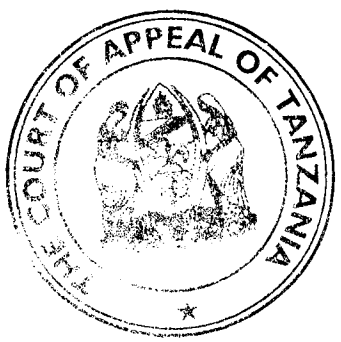
DATED at **MTWARA** this 27th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 28th day of February, 2020 in the presence of the appellant in person and Mr. Kauli George Makasi, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL