IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., KWARIKO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 378 OF 2018

MASANJA MAKUNGA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Philipo , J.)

Dated the 11th day of June, 2018
in
HC. Criminal Appeal No. 367 of 2017

.....

JUDGMENT OF THE COURT

25th March & 16th April, 2021

LILA, JA:

The Appellant, Masanja Makunga, was arraigned and convicted by the District Court of Kilosa sitting at Kilosa with the offence of grave sexual abuse contrary to section 138C (1) and (2) (b) of the Penal Code, Cap. 16 R.E 2002 (henceforth the Penal Code). Upon such conviction, he was sentenced to serve the statutory minimum sentence of twenty (20) years imprisonment.

It was alleged that on 21st day of January, 2017 at about 18:30hrs at Kibaoni area within Kilosa District in Morogoro Region, for sexual gratification, the appellant shaved pubic hair and deep kissed the mouth and ear of a thirteen (13) years old child who we shall refer to as the victim or PW1 so as to disguise her identity.

To prove the charge against the appellant, six (6) witnesses were produced and one exhibit was tendered, that is, a cautioned statement (Exhibit P1), by the prosecution. In defence, the appellant was the sole witness.

The record of appeal bears out that the victim who testified as PW1 was a STD VII pupil at Kibaoni Primary School and was 14 years old. She was living with her step mother one Mwanaisha Salum (PW2). On the fateful day around 6:30pm, the appellant, a known traditional healer, passed by their house and asked the victim to follow him at his residence so that he would protect her from devils which were disturbing her to which request she heeded. The appellant had rented a room at Mwajuma Nasibu's (PW4) house. At the time, PW4 was outside the house. The appellant and the victim entered into the room leaving outside PW1's

brother one Shomari who had followed them. They spent half an hour inside the room. PW4 was unable to see what was happening therein. As to what transpired in the room, the victim told the trial court that the appellant directed her to undress herself and be on a frog seat style. Then the appellant took a razor blade and incised her on various parts of her body, shaved her pubic hair and smeared her with medicines. During such time the appellant had undressed himself and remained with a pant. The appellant then told her to open up her legs. As she was in her menstruation period, she declined. The appellant's desire to insert his male organ into the victim's female organ, therefore, failed. He, instead, put his legs on the lap of the victim and sucked her ears and mouth. He then released her and escorted her back home. At home and upon being inquired by PW2, the victim narrated the whole incident. PW2 reported the matter to the Chairman. Consequently, the appellant was arrested and taken to the police station. WP 4457 D/CPL Theresia (PW6) of Kilosa Police Station interrogated him and recorded his cautioned statement (Exhibit P1).

In defence, the appellant completely disassociated himself with the commission of the alleged offence. Despite admitting that he was an assistant to a certain traditional healer, he attributed his arrest and being linked with the commission of the offence with the hatred between him and a certain woman he happened to have affairs with but left with his phone. As to what the prosecution witnesses had told the trial court, he claimed that they were untruthful.

After the full trial, the appellant was convicted and sentenced to serve twenty (20) years imprisonment. Dissatisfied, he unsuccessfully preferred an appeal to the High Court. Still protesting his innocence, he has preferred this appeal which comprises five grounds of complaints: -

1. *That the learned first appellate judge erred in upholding the conviction which was based on an incurably defective charge.*
2. *That PW1's evidence was taken unprocedurally as the trial court did not ascertain whether she knew the duty and meaning of speaking the truth.*

3. *That, PW2's alleged to have been told by PW1 that the appellant inserted his fingers into her vagina contrary to what was told by PW1.*
4. *That the learned first appellate judge erred in embracing PW1, PW2 and PW3 evidence where they were led to identify the appellant by pointing or touching before Court for verification.*
5. *That the charge was not proved against the appellant beyond reasonable doubt.*

At the hearing of the appeal, the appellant, who was linked to the Court through video facilities from Mtwara High Court, appeared in person and was unrepresented. Ms Faraja George, learned Senior State Attorney, represented the respondent Republic. She resisted the appeal.

When afforded an opportunity to elaborate the grounds of complaints, the appellant simply adopted them and claimed that the case was a fabricated one. He then urged the Court to allow the appeal.

In her response in respect of ground one (1) of appeal, the learned Senior State Attorney readily conceded that the charge was wanting for

failure to cite the relevant sub-section of section 138C (1) of the Penal Code. She was, however, quick to argue that it did not prejudice the appellant as he heard the particulars of the offence which detailed how he committed the offence, he heard all the prosecution witnesses testifying, he cross-examined them and lead a defence which showed that he understood the accusation levelled against him. It was her view that the defect is curable under section 388 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA). In support of her assertion, she referred the Court to the case of **William Kasanga vs Republic**, Criminal Appeal No. 90 of 2017 (unreported). She accordingly prayed this ground to be dismissed.

In respect of ground two (2) of appeal in which the appellant's complaint is in respect of the validity of PW1's evidence, the learned Senior State Attorney also conceded that there is no indication that PW1 made a promise to tell the court the truth and not lies so as to accord with the current law [amendment to section 127(2) of the Evidence Act, Cap. 6 R. E. 2002 (the EA)]. She argued that since PW1 was fourteen (14) years old at the time she gave her testimony, she was still a witness of tender age and was therefore required to abide by the law by promising to tell the trial

court the truth before her evidence was received. She, however, submitted that since she was sworn in before her evidence was taken, she is taken to have promised to tell the truth. To augment her argument, she referred the Court to the case of **Ally Ngozi vs Republic**, Criminal Appeal No. 216 of 2018 (unreported). The ground of appeal is baseless and ought to be dismissed, she pressed.

Grounds three (3), four (4) and five (5) of appeal which faulted the learned judge for not holding that the charge was not proved beyond reasonable doubt, were jointly argued by the learned Senior State Attorney. Elaborating, she argued that the victim narrated in details the incidence and her evidence was corroborated by PW4 who said he saw the appellant and the victim enter into the room and that the appellant confessed committing the offence before PW6 who recorded and tendered his cautioned statement (exhibit P1). However, on our prompting about the validity of exhibit P1, she admitted that it should be expunged from the record on account of it not having been read out after it was admitted as exhibit. That notwithstanding, she insisted that the prosecution proved the charge beyond reasonable doubt.

As it were and quite unsurprisingly, the appellant had nothing material in rejoinder. He simply maintained his plea to be set at liberty so as to let him join his long missed family which was quite far from Mtwara where he was incarcerated.

Upon our serious examination of the record, applicable statute laws and various Court's pronouncements, we are convinced that the determination of this appeal revolves around the determination of the issue whether or not the testimony by PW1 is valid.

To begin with, we entirely agree with the learned Senior State Attorney that PW1, as of the date her evidence was taken, was a child of tender age. The record bears out that she testified on 16/3/2017 and her age was indicated to be fourteen (14) years old. Also of importance to note is the fact that she was sworn in before reception of her testimony. More so, there is no indication on record that any questions were put to her and the responses thereof or that she promised to tell the trial court nothing but the truth and not lies before reception of her evidence. We are alive to the fact that section 127(2) was amended by Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016) and came into force

on 8/7/2016. The amendment deleted subsections (2) and (3) and in lieu thereof, a new subsection (2) was enacted which provides that:-

> *"(2) 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."*

Consequent to the amendment, the requirement for the court to conduct *voire dire* examination so as to determine whether or not a child witness understands the nature of an oath or affirmation and whether he can give evidence on oath or affirmation in terms of the then subsection (2) of section 127 of EA was done away with. In its place, the requirement for the child of tender age to undertake the duty of telling the court nothing but the truth and not lies as a condition precedent before reception of his/her evidence was introduced (See **Geofrey Wilson vs Republic**, Criminal Appeal No. 168 of 2018 and **Yusuph Molo vs Republic**, Criminal Appeal No. 343 of 2017 (both unreported).

As shown above, in the case under our scrutiny, PW1 gave evidence on 16/3/2017. It is recorded that she was then 14 years old. As she was not said to be more than 14 years old, in terms of section 127(4) of the EA,

she was a child of tender age. In terms of the aforesaid amendment, the trial magistrate was bound to abide to the new position of the law which requires a child of tender age to promise to tell the trial court the truth and not lies before reception of her evidence. There is no indication on record that there was any compliance as the victim did not so commit herself. The learned Senior State Attorney conceded to that. She has, however, contended that since she was sworn in before reception of her evidence, in terms of our pronouncement in **Ally Ngozi's** case (supra), her promise to tell the truth was embraced in the oath. We regrettably differ with the learned Senior State Attorney. Much as we agree with her that in **Ally Ngozi's** case (supra) we expounded that principle, the circumstances in that case are distinguishable with the present ones. As opposed to the present case, in that case, the trial magistrate conducted *voire dire* examination and the child was sworn in before her evidence was received. The Court considered responses of the child and held that conduct of *Voire dire* examination enabled the trial magistrate to satisfy himself that the child understood the nature of an oath hence the child was sworn in before reception of her evidence. It was the Court's view that understanding of the nature of an oath which was followed by her being sworn in, meant

that she was bound to tell the truth and not lies. In our present case, to the contrary, PW1 was just sworn in and her testimony taken. No preliminary inquiry was made whether by conducting *voire dire* test or by the trial magistrate posing simple questions to her so as to find out if she understood the nature of an oath. There is nothing, in the present circumstances, from which it can be inferred or deduced that the victim was a competent witness let alone being bound from not telling lies. On that account, the two cases are distinguishable. In all, we hold that **Ally Ngozi's** (supra) case was decided on its own peculiar circumstances. We, therefore hold that PW1's evidence was taken in violation of section 127(2) and (3) of the EA as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016) for want of promise to tell the trial court only the truth and not lies. That evidence is invalid hence had no evidential value. The same ought to have been disregarded as has been recently stressed by the Court that evidence received in violation of section 127(2) and (3) of EA is invalid and has no evidential value [see **Masoud Mgosi vs Republic**, Criminal Appeal No. 195 of 2018, **Abdallah Nguchika vs Republic**, Criminal Appeal No. 182 of 2018 (both unreported), **Yusufu Molo vs Republic** (supra) and **Geoffrey Wilson vs**

Republic, (supra)]. That said, we discount the evidence by PW1. This ground of appeal, for that reason, succeeds.

Consequent upon the evidence by PW1, the victim, being discounted, does there exist any other evidence connecting the appellant with the commission of the offence? This turns out to be a compelling issue for our deliberation. This issue need not hold us much. It is evident that there was no eye witness to the incident. PW4 just saw the appellant and the victim enter into the room. She was open that she did not know or see what happened therein. PW2 told the trial court what was narrated to her by PW1. PW3, similarly, told the trial court what he was told by PW1 and PW2. PW5 was informed by PW2 over the incident. In the absence of PW1's evidence the evidence by all these witnesses turned to be hearsay. That is the stance we took in the case of **Masoud Mgosi vs Republic,** (supra), where we stated that;

> "...***We agree with the learned State Attorney that PWI's evidence was invalid because she did not promise to tell the truth and not lies as required by section 127 (2) of the Act. Like we did in Ibrahim Haule's case (supra) we hereby expunge***

that evidence from the record. Having expunged PWI's evidence, the remaining evidence from PW2, PW3, PW4, PW5 and PW6 is wholly hearsay. *It was incapable of incriminating the appellant of the charged offence. On the other hand, PW7's evidence is no better. It was only capable of proving that PW1's vagina was penetrated but, as rightly submitted by Mr. Aboud, there will be no evidence proving that it is the appellant who had unlawful carnal knowledge of BM on the material date. This is so because none of the witnesses who testified during the trial saw the appellant committing the alleged offence."* (Emphasis added).

We are left with the cautioned statement (exhibit P1). Worse still, exhibit P1, having not been read out after it was admitted deserves, as conceded by the learned Senior State Attorney, to be, as we hereby do, expunged. Ultimately, there is no other evidence incriminating the appellant. The accusation against the appellant, therefore, remained not established to the hilt by the prosecution.

The above finding disposes of the appeal. We accordingly see no compelling reasons to consider the remaining grounds of appeal.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant be released from prison forthwith unless held therein for another justifiable cause.

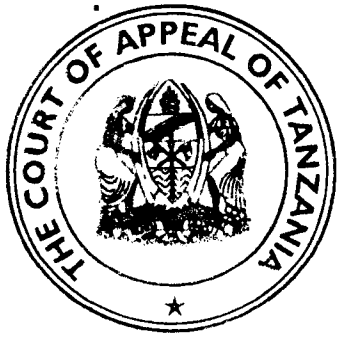
DATED at **DAR ES SALAAM** this 14th day of April, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered on this 16th day April, 2021, in the presence of appellant in person linked via video conference from Mtwara High Court and Ms. Debora Mushi, learned state Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



H .P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL