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. 10 OF 2019

MAKONGO MARWA MAKONGO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Luvanda, J.)

Dated the 21st day of November, 2018
in
Criminal Appeal No. 213 of 2018

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JUDGMENT OF THE COURT

24th March & 15th April, 2021

LILA, J.A.:

The District Court of Bagamoyo sitting at Bagamoyo sentenced the appellant, **MAKONGO MARWA MAKONGO,** to serve a jail term of thirty (30) years and to pay TZs 5,000,000.00 as compensation. That was consequent upon being charged and convicted of the offence of unnatural offence contrary to section 154(1)(a) of the Penal Code, Cap. 16 of the Revised Edition, 2002. He was accused of having carnal knowledge against the order of nature against a boy aged 13 years. We shall refer to that boy as the victim or PW1 in the course of this judgment so as to disguise his

identity. The appellant unsuccessfully appealed to the High Court. This is therefore a second appeal.

The allegation as reflected in the charge is that on 31/7/2017 at about 13:00hrs at Kidomole Village within Bagamoyo District, the appellant did have carnal knowledge of the victim against the order of nature.

The prosecution evidence as presented by nine (9) witnesses was rather straight and easy to grasp. There happened to be a water pond at a distance of about 200 meters from the appellant's homestead. On the fateful date the victim (PW1) and his friend and also a class mate one Shabani Waziri (PW2) were at school. During the break time the two felt thirsty. They went to the water pond to drink water. As they had no cup, they used a "maji safi" bottle to fetch the water and drink. No sooner had they left the water pond, then the appellant appeared and put them under restraint accusing them of polluting the water. The punishment for that, as he exhibited in a text message of his mobile phone, was either to pay TZS 50,000.00 fine, be reprimanded 50 strokes of the cane or be locked in police custody for ten days. As they were pondering as to what would be a better and convenient choice to them, another group of pupils went to the

pond to drink water which comprised Fadhili Abasi (PW3) and Abuu. A good luck to them, they were given a cup by the appellant, fetched water and drunk. They were thereafter discharged leaving behind the victim and PW2 with the appellant. PW3 confirmed that while with his friends they found the victim and PW2 in the appellant's house and also that they left them there when the appellant allowed them to part.

The victim opted for being caned as a result of which PW2 was told by the appellant to bring the sticks from the nearby burial bush ("Msitu wa Maziara"). The appellant rejected the sticks brought to him hence he ordered the victim to go and bring others while he followed him from behind holding a sword. PW2 did not accompany them. In the bush, the appellant ordered the victim to undress and bend forward and he sodomised him. Thereafter, the appellant wiped the victim's anus and let him go warning him not to disclose the matter lest he would kill him. Helplessly, the victim left. As he was passing near the water pond he fortunately met one Msichoke Said (PW6), a people's militia to whom he narrated the whole episode. Not soon, the appellant appeared and upon being questioned by PW6, he denied sodomising the victim. He, instead, claimed to have had chastised him only. PW6 inspected the victim and

found sperms on the buttocks and he reported the matter to Kidomole Primary School Head Teacher one Ahmad Idd Abdallah (PW5) and later to police. PW2 gave similar stories to that of the victim save for what transpired in the burial bush where the appellant and the victim had gone to find sticks. He further testified that the two stayed in the bush for about half an hour and on return, the victim's eyes appeared red and upon inquiring from him, the victim replied by sign that he was sodomised. He then reported the matter to a group of teachers including PW5.

On his part, PW5 told the trial court that upon being informed of the incident, he reported the matter to Mwanesenga Hamlet Chairman one Siasa Mohamed (PW7) and the victim's mother one Salama Iddy Tamla (PW4). PW4 gave similar evidence to that by PW5 and added that the victim was aged thirteen (13) years, was in Standard VII in the year 2017 and was schooling at Kidomole Primary School and that she formally reported the matter to the Police Station. WP. 4432 C/CPL Farida (PW8) investigated the case and told the trial court that she checked the victim and saw bruises at the buttocks which had however started to heal and that the appellant denied involvement in the commission of the offence. In order to establish whether there was penetration, the victim was taken to

Bagamoyo District Hospital and was medically examined by Dr. Nyambari Batholemeo (PW9) who was of the view that the victim had bruises in his anal part; rectal sphincter was loose but did not see any fluids or sperms at the anal area. As to what might have caused the bruises, he was of the view that several factors may contribute including constipation and penetration by anything from outside. He recorded his finding on a PF3 (exhibit P1).

On his part, the appellant (DW1) protested his innocence in his defence. He claimed that he was arrested at his home and was severely beaten by a group of people on accusation of refusing to sell part of his boss's farm. His assertion, however, did not find support from his boss who was his sole witness one Dr. Patrick Magosole (DW2) who told the trial court that apart from the appellant being his watchman in his farm, no dispute existed in respect of the farm since 22/02/2017 when he bought it. In respect of the accusations, he said that he was only informed by PW7 about the appellant being brutally beaten on accusation of rape.

The trial court found the appellant guilty. That finding was premised on PW1 being a credible witness and his evidence being corroborated by

PW2, PW3, PW6 and PW9. According to the trial court, PW1 being the victim, gave a detailed account of the ordeal which evidence was corroborated by PW2 who said he saw the appellant and victim going into the burial bush, PW6 first saw the victim and later the appellant coming out from the bush and was told by the victim of what had befallen him and lastly PW9 who said he saw bruises at the victim's anal part which suggested that he was penetrated.

The appellant's defence was brushed off for the reason that; **one**, his claim that the essence of the matter was his refusal to sell part of DW2's farm did not find support from the said DW2 and; **two**, that being beaten by villagers is no defence to unnatural offence.

On appeal to the High Court, the appellant raised ten (10) grounds of appeal. The complaints substantially centred on improper conduct of the *voire dire*, incredible testimonies by PW1, PW2, PW3, PW6 and PW9 due to apparent inconsistences, he was, like the victim, not medically examined by PW9 particularly that no DNA test was conducted; his defence not being considered and generally that the prosecution failed to prove the charge against him. The High Court did not find merit on any of them and

dismissed the appeal. It found all the witnesses credible and that no inconsistences or discrepancies existed between the prosecution witnesses. It, generally, found that the prosecution evidence was watertight and thereby concurred with the trial court's findings. In respect of the conduct of *Voire Dire* test, the learned appellate judge stated, we hereunder quote: -

> *"Basically the appellant complaint are without base, for one thing a voire dire test was conducted in respect of PW1, PW2, PW3. More important, a requirement of voire dire was abolished by enactment of the Written Laws (Miscellaneous Amendments (No. 2) Act No. 4 of 2016 where the provision of subsection (2) and (3) of section 127 to the Tanzania Evidence Act were deleted (see also* ***Philipo Emanuel vs Republic****, Criminal Appeal No. 499 of 2015 C. A. T. at Mbeya (unreported) at page 14). As much PW1, PW2 and PW3 were able to explain facts in issue and gave rational answers to questions posed to them, therefore a complaint by the appellant is baseless."*

Still discontented, the appellant has accessed this Court armed with a nine point memorandum of appeal. However, at the hearing before us, Dr. Chacha Murungu, learned advocate, who represented the appellant,

informed us that he had agreed with the appellant to abandon all other grounds save for grounds 2 and 9 only. He also sought and was granted leave by the Court to add one new ground in terms of Rule 81(1) of the Tanzania Court of Appeal Rules, 2009. That ground states that: -

> *"The first appellate court erred in upholding the conviction and sentence imposed by the trial court based on evidences of children of tender age which were received in violation of section 127(2) of the Evidence Act, cap. 6 R. E. 2002 as they did not promise to tell the truth to the court and not to tell any lies as required by law."*

To that effect, the appellant's grounds of complaint substantially remained to be: -

1. That the learned first appellate judge erred for not holding that the PF.3 (exhibit P1) was wrongly relied on in convicting the appellant for want of being read out after it was admitted as exhibit.
2. That the charge was not proved against the appellant beyond reasonable doubt.

3. That the testimonies of the witnesses who were children of tender age were received in violation of section 127(2) of the Tanzania Evidence Act, Cap. 6 R. E. 2002 for want of promise to tell the court the truth and not lies.

Before us for hearing of the appeal were Dr. Chacha Murungu, learned advocate, who as indicated above, represented the appellant and Ms. Rehema Mgimba and Ms. Elizabeth Olomi, both learned State Attorneys who joined forces to represent the respondent Republic. The appellant participated in the hearing through video facilities linked to the Court from Ukonga prison.

In addressing the Court, Dr. Murungu chose to begin arguing in respect of the additional ground of appeal, that is, the third ground first. He emphasized that PW1 and PW2 were children of tender age as they were both aged thirteen (13) years hence reception of their respective testimonies was conditional in that they should have promised to tell the trial court the truth and not lies. He argued that the amendment of section 127(2) of the Evidence Act, Cap. 6 R. E. 2002 (the EA) by the Written Laws

(Miscellaneous Amendment) Act No. 2 of 2016 did away with the requirement to conduct a *voire dire* test to a child before reception of his evidence and allowed a child of tender age to give evidence without oath or affirmation upon promising to tell the court only the truth and not lies. To bolster his assertion, he referred us to our decision in the case of **Godfrey Wilson vs Republic**, Criminal Appeal No. 168 of 2018 (unreported). To the contrary, he argued, in the present case the trial court conducted a *voire dir*e test and the two children who were witnesses never made a promise to tell the truth and not lies before their testimonies were taken. He stressed that such evidence which implicated the appellant with the commission of the offence was therefore received in total violation of the law and the same should be expunged from the record. Exclusion of such evidence miserably affects the prosecution case, for; it renders the evidence of other witnesses hearsay and with nothing to corroborate save for the evidence of PW9, Dr. Murungu added. As for the evidence of PW9, the learned advocate submitted that, at its best, it can establish penetration only but not the perpetrator.

Elaborating briefly on the first ground of appeal, the learned advocate argued that exhibit P1 was wrongly acted on to found the

appellant's guilt, particularly so because it was not read out after it was admitted as exhibit. He urged the Court to expunge it from the record.

In respect of ground two of appeal, Dr. Murungu submitted that besides the above deficiencies which cause the prosecution case to crumble, yet there were other weaknesses that affect the prosecution case with the effect of rendering the charge not proved to the standard required. He pointed out that the prosecution witnesses were unreliable on various accounts they gave in their respective testimonies. **One**, they differed on the time the offence was committed. PW1 said it was committed at 03:00hrs, PW2 at 12:00noon, PW3 at 13:00hrs, PW7 at 10:00hrs and PW9 at first he said at 15:00hrs but later changed and said at 14:45hrs. **Two**, they differed on where the offence was committed. PW1 said in the burial bush (Msitu wa Maziara) while PW7 said simply in the bush. **Three**, while PW7 said he noted sperms on the victim's buttocks, PW9 did not note the same. And **four**, the witnesses were not certain as to which offence was committed. While PW1, PW2, PW3, PW4, PW5 and PW8 said it was unnatural offence, PW6 and PW7 said it was rape. To Dr. Murungu these discrepancies were serious and went to the root of the

case. They render the prosecution evidence unreliable. For the above reasons, the learned advocate requested the Court to allow the appeal.

On the way forward upon the appeal being allowed, Dr. Murungu pressed the Court to stand by its long established practice in situations of serious violations of procedure by setting at liberty the appellant rather than making an order for retrial saying that will work injustice to the appellant as it will accord the prosecution with an opportunity to fill up the procedural infractions complained above and that the appellant has already served about three years of the sentence which emanated from what he termed "nullity proceedings".

For the respondent Republic, Ms. Mgimba resisted the appeal. She however admitted that following the amendment of section 127(2) of the EA, conduct of *voire dire* test was no longer a requirement. She, all the same, threw the blame to the trial court which strayed into such error. For a reason that there is need to protect and do justice to the victim, she was at one with the learned first appellate judge's finding on the issue of *voire dire* test. The case of **Nestory Sinchimba vs Republic**, Criminal Appeal No. 454 of 2017 (unreported) was cited to augment her argument.

The learned State Attorney also conceded that Exhibit P1 was wrongly acted on for want of being read out after it was admitted into evidence. She also admitted that the omission was fatal and was inclined the same be expunged from the record. She, however hurriedly pointed out that the oral testimony by PW9 remains and his oral account of what he saw when he examined the victim sufficiently established penetration. She made reference to the case of **Issa Hassan Uki vs Republic**, Criminal appeal No. 129 of 2017 (unreported).

Ms. Mgimba faulted the third ground of appeal arguing that it not being a point of law, should not be considered by the Court because it was not raised and determined by the first appellate court. She referred the Court to the case of **Godfrey Wilson vs Republic**, (supra) to support her argument.

In the event the appeal is allowed, the learned State Attorney implored us to order a retrial basically because the infractions were occasioned by the trial court for which the prosecution is not to blame.

In his brief rejoinder, Dr. Mulungu recapped his earlier submissions save for the learned State Attorney's arguments on ground three of appeal

which he said was not new as the petition of appeal found at page 70 of the record of appeal reflects the same in which it featured as ground seven (7) of appeal. For that reason he urged the Court to consider that ground of appeal.

In the determination of this appeal, unlike counsel for the parties, we shall consider all the grounds of appeal jointly. The reason is not hard to find. The determination of the appeal, in our strong view, solely depends on whether or not the evidence by PW1 and PW2 was valid. PW1 being the victim of the ordeal and whose evidence is considered to be the best in sexual offences (see **Selemeni Makumba vs Republic** [2006] T.L.R. 379), gave a detailed account of what befell on him after leaving with the appellant to the burial bush (Msitu wa Maziara). PW2 who was in PW1's company remained in the appellant's house and witnessed PW1 and the appellant going into the bush and when they returned and that he was first to ask PW1 what had happened as his eyes were read. PW1 responded by a signal that he was carnally known by the appellant against the order of nature. Carefully considered, the evidence by the two witnesses could sufficiently establish the appellant's guilt. Therefore PW1 and PW2 were

crucial witnesses in this case. Being children of tender age, the crucial issue before us is whether their respective evidence was properly taken.

Counsel for the parties, luckily, are agreed that the testimonies by PW1 and PW2 were received in violation of section 127(2) as amended by Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016) which came into force on 8/7/2016. In effect, the amendment deleted subsections (2) and (3) and substituted them with a new subsection (2) which reads 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."*

The amendment did away with the requirement for the court to conduct *voire dire* examination to a child of tender age so as to determine his or her understanding of 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. In its stead, the amendment introduced 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 (See **Geofrey Wilson vs Republic**, (supra) and **Yusuph Molo vs Republic**, Criminal Appeal No. 343 of 2017 (both unreported). Since PW1 and PW2 gave evidence on 23/10/2017, it cannot be disputed that the trial magistrate was bound to abide to the new position of the law which does not require the trial court to conduct *voire dire* examination before reception of evidence of a child of tender age.

The record, in the present case, is vivid that the trial magistrate conducted *voire dire* examination to PW1 and PW2 before receiving their respective testimonies. On that account, without hesitation we take side with the learned submissions by the learned counsel for the parties that the procedure adopted by the trial magistrate is not mandated by the law as it now stands. It was irregular and as has been recently stressed by the Court, 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, as entreated by the learned counsel of the parties, discount the evidence by PW1 and PW2.

Given the aforesaid stance of the law, with respect to the learned first appellate judge, we don't share with him the view that the ability of the witnesses to understand questions put to them and give rational account of the incident or explain the facts in issue as he put it was sufficient to show that they understood the need to tell the truth. We reinstate that the requirement of the need for the child of tender age to promise to tell the court the truth and not lies before his evidence is taken be abided to the letter.

A follow-up issue for our deliberation would definitely be whether there still remains other evidence supporting the charge. The record of appeal bears out that none of the remaining witnesses witnessed the incident. PW3, if anything to go by, simply said he found PW1 at the appellant's house and left after quenching his thirsty, PW6 told the trial court what he was told by PW1, PW6 reported the matter to PW5 who in turn informed PW4 and PW5. In the absence of PW1's evidence from whom the information was sourced, the testimonies of all these witnesses

were second-hand information, hearsay evidence. Faced with a somehow identical situation in the case of **Masoud Mgosi vs Republic,** (supra), the Court stated that;

> "...***We agree with the learned State Attorney that PWl'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 Hauie's case (supra) we hereby expunge that evidence from the record. Having expunged PWl'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).

The above finding of the Court squarely applies in our present case. By analogy, we similarly hold the evidence of PW3, PW4, PW5, PW6, PW7

and PW8 to be hearsay evidence hence incapable of linking the appellant with the commission of the offence.

We are, however, mindful of the testimony by PW9. In the first place, we agree with the learned counsel for the parties that exhibit P1 was invalid evidence and deserved no consideration because it was not read out in court after it was cleared for admission (see **Robinson Mwanjisi & Others vs Republic** [2003] T.L.R. 218). We accordingly expunge it from the record. We are however in agreement with the learned State Attorney that the oral testimony in court by PW9 remained unaffected and deserved the court's consideration. We, however, hasten to say that it does establish the victim being penetrated only. Such evidence is wanting on who was the perpetrator or ravisher. In all, therefore, there is no evidence implicating the appellant. The above leads us to no other conclusion but that the prosecution failed to prove the charge against the appellant.

Is this a fit case to order a retrial? This is the issue we are called upon to deliberate last. To begin with, guidance on factors to consider before making an appropriate order is made were with lucidity discussed in the often cited decision by the defunct East African Court of Appeal of

Fatehali Manji vs Republic [1966] E. A. 341. In that case it was stated that: -

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where the conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that, a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made when the interest of justice require."*

The Court adopted the principles stated in the above decision in the case of **Selina Yambi and Others vs Republic**, Criminal Appeal No. 94 of 2013 (unreported) in which the Court stated: -

> *"We are alive to the principle governing retrials. Generally, a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. The bottom line is that,*

an order should only be made where the interest of justice require."

To recap, the counsel for the parties parted ways on the way forward. We have given due weight to the learned contending arguments by the counsel and examined the record. It is noteworthy that the appellant was charged with a serious offence which attracts a severe sentence of thirty (30) years jail term. His conviction was founded on evidence by PW1 and PW2 whose evidence have been discounted for non-compliance with the procedure of receiving evidence of a child of tender age. The learned State Attorney's complaint that the prosecution is not to blame for that happening, on the authorities above, is baseless. Further to that, being officers of the court, they are obliged to remind the trial magistrate to abide by the law instead of remaining passive. Besides, the discrepancies pointed out by Dr. Murungu are apparent on the face of the record and which cannot be ignored. We entertain no doubt, as rightly argued by Dr. Murungu, that given an opportunity, the prosecution will ensure that such infractions are not repeated at the detriment of the appellant. An order of retrial is therefore prone to occasion an injustice to the appellant. That is definitely against the spirit embraced and expressed

in **Fatehali Manji's** case (supra). In all fairness, therefore, we think this is not a fit case to order a retrial.

All said, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant be released from prison forthwith unless held therein for another lawful 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 15th day April, 2021, in the presence of appellant in person linked via video conference from Ukonga Prison and Ms. Debora Mushi, learned state Attorney for the Respondent/ Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL