IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 402 OF 2019

(CORAM: NDIKA, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)

JAFARI MAJANI .....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mutungi, J.)

dated the 21st day of August, 2019
in
Criminal Appeal No. 320 OF 2018
.....

JUDGMENT OF THE COURT

17th August & 6th September, 2021

MWAMPASHI, J.A.:

Jafari Majani, the appellant herein, was charged with and convicted by the District Court of Temeke at Temeke of the offence of grave sexual abuse c/s. 138C (1)(a)(2)(b) of the Penal Code [Cap 16 R.E. 2002] (now R.E. 2019). It was alleged before the trial court that on 01st August, 2017 at Mtoni Mtongani Kwa Aziz Ally within the District of Temeke in Dar es Salaam Region, for sexual gratification, the appellant gravely sexually abused "H. M. S", a six (6) years old girl (hereinafter PW2 or the victim) by pressing his penis into her anus.

Upon conviction the appellant was sentenced to serve the statutory minimum sentence of twenty (20) years imprisonment and in addition he

was ordered to pay Tshs. 200,000/= to PW2 as compensation. Being aggrieved by the conviction and sentence, he appealed to the High Court but his appeal was dismissed hence this second appeal to this Court.

The facts of the case which led to the appellant's arraignment and conviction, as they can be gleaned from the record of appeal, are simple and straightforward. On the material evening, PW2, had been playing with other grandchildren of PW1 outside their house. At some point, when other children had got back to the house, an unknown man to PW2 appeared, gave her Tshs. 350/= and led her into a certain unfinished and abandoned building. In the building the man took PW2's underpants out, bent her and put his penis in PW2's anus. After ejaculating the man released PW2 but before doing so he took his Tshs. 350/= back from PW2. Thereafter, PW2 got back home in tears and reported the incident to her grandmother (PW1), who examined her and observed that PW2 had sperms on her buttocks. PW2 was then asked to lead PW1 and some neighbours to the scene and as luck would have it, they met the appellant on the way who was identified by PW2 as the man who had ravished her. The case was immediately reported at Kilwa Road Police Station where the appellant was restrained till the next day when he was interrogated by PW3 WP 6310 Getruda Emmanuel who also recorded statements of PW1 and PW2 before visiting the scene of the crime where she took some

pictures of the scene. The pictures were collectively received in evidence as Exhibit P1. PW2 was also medically examined by PW4 Dr. Deogratius Kalanga whose examination revealed that PW2's hymen and her anus were intact and normal but the hyperemic tissues on her vagina were reddish. PW4 tendered to the trial court a PF3 which was received in evidence as Exhibit P2.

In his defence the appellant denied to have committed the offence in question against PW2. He claimed that the case had been fixed on him by PW2's mother who used to be his lover and who had promised to teach him a lesson after finding him with another woman.

After the full trial, the appellant was convicted and sentenced as earlier alluded to. The appellant's conviction was essentially based on the evidence from PW2 which the trial court found to be credible and reliable. The trial court did also find that PW2's evidence was well corroborated by that of PW1, PW3 and PW4. The findings and decision by the trial court were upheld by the High Court. Still aggrieved, the appellant, has preferred this second appeal on five (5) grounds. However, as at the hearing of the appeal, the respondent Republic supported the appeal on the 1st ground of appeal, we find it proper not to reproduce all of the grounds raised but the 1st one which is to the effect that:-

1. *That the 1st appellate judge erred and misdirected herself in finding that PW2 was credible and reliable while the voire dire examination was conducted contrary to the Evidence Act (Cap 16 R.E. 2002) as amended by Act No. 4 of 2016.*

When this appeal was called on for hearing, the appellant appeared in person and was unrepresented. On the other hand, the respondent Republic was represented by Mr. Eric Shija, learned State Attorney, who was assisted by Mr. Benson Mwaitenda, also learned State Attorney.

Upon being called to argue his appeal, the appellant opted to let the learned State Attorneys respond to the grounds of appeal first. He however reserved his right to rejoin later if need would arise.

As we have alluded on earlier, Mr. Shija responded to the appeal by intimating that the respondent Republic was not opposing the appeal. He readily concurred with the appellant on the 1st ground of appeal that the evidence of PW2 was irregularly received in contravention of the mandatory provision of S. 127(2) of the Evidence Act, [Cap. 6 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016 (hereinafter the Evidence Act). He submitted that under S. 127(2) of the Evidence Act, a child of tender age is allowed to testify not on oath provided he/she promises to tell the truth and not lies. He

then referred the Court to pages 14 and 15 of the record of appeal where it is clearly shown that PW2 gave evidence without promising to tell the truth. Relying on **Masoud Mgosi v. Republic,** Criminal Appeal No. 195 of 2018 (unreported), Mr. Shija urged the Court to expunge PW2's evidence insisting that the evidence is invalid for being received in contravention of S. 127(2) of the Evidence Act.

Lastly, it was submitted by Mr. Shija that after PW2's evidence is expunged there will remain no evidence on record to prove that the appellant committed the offence in question. He argued that as PW2 was the only material witness and also that since in sexual offences the best evidence comes from the victim, then, under the circumstances of this case, the said exclusion of PW2's evidence leaves no evidence on record to support the charge. Mr. Shija did therefore pray that the appeal be allowed on the 1st ground of appeal by quashing the conviction and setting aside the sentence and the compensation order.

Not surprisingly, the appeal having been supported by the respondent Republic, the appellant had nothing to say in rejoinder. He only reiterated his prayer that the appeal be allowed.

From what is being complained of by the appellant on the 1st ground of appeal and also considering the submission made by the learned State

Attorney for the respondent, it is apparent that the determination of this appeal squarely lies on the validity of PW2's testimony. Further, since PW2's evidence was, undoubtedly, given and received under S. 127(2) of the Evidence Act, then the discussion on the import and application of that provision, cannot be avoided.

To begin with, we totally agree with Mr. Shija that the evidence from PW2, who at the time her evidence was being taken was six (6) years old, was taken without a promise from her that she would tell the truth and not tell any lies as it is required under S. 127(2) of the Evidence Act. It is also a fact that cannot be disputed that PW2 was a child of tender age as per S. 127(4) of the Evidence Act. The record show that after the trial court had conducted the *voire dire* test on PW2 and after finding that PW2 did not understand the nature of an oath but that she is possessed of sufficient intelligence and gives rational answers to questions put to her, PW2 was declared a competent witness whose evidence could be received but not on oath. Thereafter her evidence was received without her promising to tell the truth and not tell lies in contravention of mandatory provision of S. 127(2) of the Evidence Act.

The offended sub-section (2) of S. 127 and sub-section (1) of the same section, which to our view, is also of relevance here, provides as follows;-

S. 127(1) *Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reasons of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.*

(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 tell any lies".

Generally, as it is provided under S. 127(1) reproduced above, every person is competent to testify in court. There are however, some persons who, owing to their incapability of understanding questions put to them and their inability to give rational answers to those questions, either due to their tender age, extreme old age or disease of mind or body, are disqualified from testifying in court. It is also the law that every person who appears before the court of law in judicial proceedings as a witness must take an oath or make an affirmation before he testifies (see S. 198(1) of the Criminal Procedure Act, [Cap 20 R. E. 2019). S. 127(2) which allows children of tender age to testify without taking an oath or making

an affirmation, is therefore an exception which is however on condition that such children must first promise to tell the truth and not to tell any lies.

In regard to S. 127(2) and before going any further, we find it appropriate to remark, at this very stage, that this case at hand is yet another case in which the issue on the import and application of S. 127(2) of the Evidence Act, particularly when the reception and validity of evidence of witnesses of tender years is at issue, is again raised. Since its inception on 08/07/2016 through the Written Law (Miscellaneous Amendments) (No. 2)(Act No. 4 of 2016), the provision has been tested and the position has been set by this Court in a number of cases including **Masoud Mgosi** (supra), **Ibrahim Haule v Republic**, Criminal Appeal No. 398 of 2018, **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 and **Issa Salum Nambaluka v Republic**, Criminal Appeal No. 272 of 2018 (All unreported) to mention but a few.

In **Godfrey Wilson** (supra) it was observed by the Court thus;-

> *"To our understanding, the above provision as amended, provides for two conditions, **One**, it allows the child of tender age to give evidence without oath or affirmation. **Two**, before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies"*

And in **Nambaluka** (supra), this Court reiterated the position and emphasized as follows:-

> *"From the plain meaning of the provision of sub-section (2) of S. 127 of the Evidence Act, which has been reproduced above, a child of tender age may give evidence after taking 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 the 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".*

As to what has to be done when a child of tender age appears before the court as a witness the Court in **Godfrey Wilson** cited above directed thus;-

> *"S. 127(2) as amended imperatively require a child of a tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of tender age. 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 he/she understands the nature of oath.*
3. *Whether or not the child promises to tell the truth and not tell lies.*

Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

Basing on what this Court held in **Godfrey Wilson** (supra) and **Nambaluka** (supra) as demonstrated above, it is settled that in situations where a child witness is to give evidence without taking oath or making an affirmation, the child must first and foremost make a promise and undertake not to tell any lies. The promise to tell the truth and the undertaking not to tell any lies must be recorded.

It should be emphasized that it is from the above circumstances that our decisions in **Godfrey Wilson** (supra) and **Nambaluka** (supra) in essence demand the competence of a child of tender age witness to be tested first, albeit in brief, before his evidence is received under S. 127(2) of the Evidence Act. The provision enjoins trial courts when dealing with children of tender age as witnesses, to still conduct a test on such children to test their competence. It is unthinkable that S. 127(2) of the Evidence Act can be blindly applied without first testing a child witness if he does

not understand the nature of an oath and if he is capable of comprehending questions put to him and also if he gives rational answers to the questions put to him.

In the instant case, as we have demonstrated earlier, the record clearly shows, on page 15 of the record of appeal, that PW2's evidence was given and received without a promise and an undertaking by her that she would tell the truth and not tell lies as it is required under S. 127(2) of the Evidence Act. We therefore agree with both the appellant and the learned State Attorneys that the evidence from PW2 was received in contravention of the law and thus it is of no value. Consequently, as we did in **Nambaluka** (supra) and also in **Godfrey Wilson** (supra), we accordingly expunge the said evidence from the record. The 1st ground of appeal is therefore found to be meritorious.

At this juncture, we also agree with the learned State Attorneys that having expunged the evidence from PW2, the remaining evidence is short of proving that the appellant committed the offence in question against PW2. The evidence from PW1 and PW3 is hearsay evidence. Neither of them witnessed the alleged abuse being committed against PW2 by the appellant. Even the evidence from the doctor (PW4) is of no help because it does not prove that it is the appellant who allegedly abused PW2.

Basing on our above findings on the 1st ground of appeal, we therefore conclude that the appellant was wrongly convicted. The case against him was not proved to the hilt. Accordingly, we allow the appeal, quash the conviction and set aside the sentence and the compensation order. It is also ordered that the appellant, Jafari Majani, be released from the prison forthwith unless he is otherwise lawfully held.

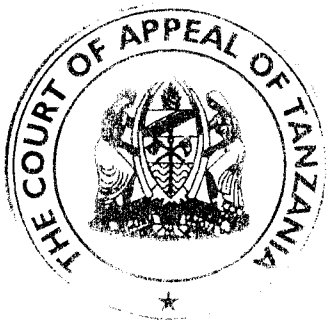
DATED at **DAR ES SALAAM** this 2nd day of September 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of September, 2021 in the presence of the appellant in person Ms. Esta Kyara, learned Senior State Attorney for the respondent is hereby certified as a true copy of the original.



H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL