IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A, SEHEL, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 462 OF 2019

HASSAN YUSUPH ALLY..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the judgment and decree of the Resident Magistrate's Court of Dar es Salaam at Kisutu with Extended Jurisdiction)

(Kisongo, SRM – Ext. Juris.)

dated 3rd day of October, 2019
in
DC. Criminal Appeal No. 27 of 2019

JUDGMENT OF THE COURT

24th August & 14th September, 2021

SEHEL, J.A.:

This is a second appeal by Hassan Yusuph Ally (the appellant) having been aggrieved by the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu (Kisongo, SRM- Ext. Jur.) (the first appellate court) which upheld the conviction and sentence of the appellant.

The appellant was arraigned before the District Court of Ilala (the trial court) with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R. E. 2002 (henceforth the Penal Code). It was alleged

at the trial court that on diverse dates of May, 2017 at Madafu area within Ilala District in Dar es Salaam Region, the appellant did have carnal knowledge against the order of nature to a girl aged 14 years whom we shall henceforth refer to as the "victim" or PW1 to protect her identity. The appellant pleaded not guilty to the charge. Consequently, the case proceeded to a full trial whereby the prosecution paraded a total of four witnesses and tendered one exhibit, PF3 (Exhibit P1) whereas the appellant fended for himself and called one witness, his sister, Kashinde Arifa (DW2). At the end of the trial, the appellant was found guilty as charged. He was thus convicted and sentenced to life imprisonment. His appeal to the first appellate court was unsuccessful hence the present appeal.

Briefly the prosecution case was such that: - the appellant and the victim knew each other as neighbours. The appellant was residing in his sister's house which was near the house of the victim's grandparent. The victim used to go to the house of the appellant's sister to play and watch television (TV). Sometime in May, while the victim was at the house of the appellant's sister watching TV, the appellant took her to his bedroom. He undressed her, carried her over to sit on his lap and forcefully inserted his male organ into PW1's anus while holding her tightly. PW1 felt great pain but

she could not raise any alarm because the appellant had covered her mouth by his hands. After the appellant completed the act, he took the victim outside the house and threatened her not to tell anyone on what had transpired. As PW1 was scared, she did not disclose the ordeal to anybody. Nonetheless, she started having constipation. Her mother, Jamila Abdallah (PW3) tried to treat her by giving her pawpaw and some medicines but to no avail. Her condition got worse. Thus, her aunty, Mwajuma Abdallah (PW2) took her to Ukonga hospital for treatment.

Upon examination, the doctor at Ukonga hospital noticed that PW1 was carnally known against the order of nature. He thus advised the aunty and the mother to go and report the incident to the police before he could administer any treatment to the victim. It was at the police station where PW1 narrated what had befallen her and named the appellant in the presence of PW2 and PW3. They were issued with PF3 and went back to the hospital where she was attended and referred to Amana hospital. At Amana hospital, Dr. Kamani Godfrey (PW4) examined the victim and observed that her vagina was intact but her anus was open with some bruises. He wrote his findings in the PF3 that there was evidence of penetration due to the presence of loose anal sphincter muscles, lacerations and inability to control

stool. Later on, the appellant was arrested and arraigned in court as stated herein.

In his defence, the appellant totally denied any involvement. He claimed that at the time the incident took place, he was already relocated to Ukonga Mazizini to his uncle. To support his *alibi*, he called DW2 who told the trial court that the appellant moved to his uncle's house in December, 2016. However, the appellant did not dispute that PW1 used to go and watch TV and that he knew her very well.

At the end of the full trial, the appellant was convicted and sentenced as shown herein. In convicting the appellant, the trial court relied on the evidence of PW1 who was found to be a truthful witness. It also found that the evidence of PW1 was corroborated by PW2 especially on the fact that PW1 fell sick. She had severe constipation and PW2 had to take her to the hospital. Further, it found that the evidence was also corroborated by PW4 and Exhibit P1. The trial court discarded the defence of *alibi* because the appellant did not comply with the provisions of section 194 (4) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019 (the CPA)) and that apart from the oral account there was no evidence to support it. Dissatisfied, he unsuccessfully appealed to first appellate court. It is

noteworthy to point out here that the appellant did not complain on the procedure adopted by the trial court in receiving the evidence of PW1. That complaint was raised in this second appeal.

In the appeal before us, the appellant had advanced seven grounds in the memorandum of appeal which are: -

1. *The learned first appellate court erred in law by relying on the un-procedurally procured evidence of PW1 to sustain the appellant's conviction while the same was procured contrary to section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016.*
2. *That, the learned first appellate court erred in law by sustaining the appellant's conviction based on a charge sheet whose particulars of offence did not state the dates and numbers of times that the alleged incident took place thus it was in variance with the evidence on record delivered by PW1 especially in her cross-examination by appellant and re-cross examination by the prosecutor.*
3. *That, the learned first appellate court erred in law by sustaining the appellant's conviction in a case where the victim's age was not proved to the required standard contrary to the procedure of law as the appellant raised doubts regarding the same in his cross examination of PW3.*

4. *That, the learned first appellate court failed in its duty to asses and re-evaluate the evidence on record in form of re-hearing hence failing to note;*

   (i) Material discrepancy between the evidence of PW5, his findings as seen in the PF3 (Exh. P1) the evidence of PW1 (the victim) and that of PW2 as to what PW1 was suffering from.

   (ii) There was no investigatory evidence led to prove that the appellant was arrested in connection with the alleged offence.

   (iii) There was no investigator evidence led to establish that the investigator or any of the prosecution witnesses visited the scene of crime to ascertain that the incident took place.

   (iv) The variance of names mentioned by PW1, PW2 and PW3 as to who was the perpetrator of the alleged crime and were not proved to belong to one and the same person.

5. *That, the learned first appellate court erred in law by sustaining the appellant's conviction and holding that the learned trial magistrate took cognizance of the defence of alibi by the defence witnesses but the same is not borne out of the records as the trial court's judgment is clear that the defence of the appellant was disregarded.*

6. *That, the learned first appellate court erred in law by failing to consider the defence of alibi raised by the appellant, bearing in mind that the appellant was a lay person and unrepresented hence could*

have not known the procedure of law to be adopted for one raising a defence of alibi.

7. *That, the learned first appellate court erred in law and fact by sustaining the appellant's conviction based upon incredible and contradictory evidence of the prosecution witnesses and that the prosecution failed to prove its case beyond reasonable doubts."*

At the hearing of the appeal, the appellant appeared in person. He had no legal representation whereas Miss Faraja George, learned Senior State Attorney assisted by Mr. Adolf Kisima, learned State Attorney appeared for the respondent Republic.

Upon given a chance to submit on his grounds of appeal, the appellant had nothing much to say. He prayed to adopt his filed written submissions and opted to submit after hearing a response from the learned Senior State Attorney.

In reply, Miss George outrightly supported the appeal. Submitting on the first ground of appeal that the trial court failed to comply with the requirement of 127 (2) of the Evidence Act, Cap 6 R.E. 2019 (the Evidence Act) when receiving the evidence of PW1 who was a child of tender age, she stated that section 127 (2) of the Evidence Act was amended in 2016 through Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of

2016). Prior to the amendment, the trial court was required to conduct *voire dire* test in order to establish whether the child of tender age knows the nature of oath or he/she possesses sufficient intelligence for reception of his/her evidence and after amendment, the child of tender age is required to promise to tell the truth and not lies.

She pointed out that, in the appeal before us, PW1 was a child of tender age of 14 years but her evidence was received upon affirmation without the trial court be satisfied that the witness was competent to testify under oath and she did not promise to tell the truth. She referred us to page 10 of the record of appeal where the trial court after recording the personal particulars of PW1, the trial court affirmed the witness and thereafter recorded her evidence. It was the submission of Miss George that the procedure adopted by the trial court in receiving the evidence of PW1 was in contravention of section 127 (2) of the Evidence Act thus rendering the evidence of PW1 to be invalid. She therefore urged us to discount the evidence of PW1 as it was in the case of **Masanja Makunga v. The Republic**, Criminal Appeal No. 378 of 2018 (unreported). On the way forward, she argued that since the remaining evidence could not warrant a conviction against the appellant then the appeal should be allowed for that

sole ground and the conviction be quashed, sentence be set aside and the appellant be set free from prison custody.

In rejoinder, the appellant welcomed the positive submission made by the learned Senior State Attorney. He therefore prayed to the Court to allow his appeal and be set free from prison custody.

Having heard the submissions by Miss George and gone through the grounds of appeal and the record of appeal, we entirely agree with the learned Senior State Attorney that the first ground of appeal suffices to dispose the whole appeal. In that ground the appellant complained that the trial court did not comply with the requirement of section 127 (2) of the Evidence Act when it was receiving the evidence of PW1 who was a child of tender age of 14 years. For ease of reference, we take the liberty to reproduce section 127 (2) of the Evidence Act which provides: -

> *"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."*

It follows then that the law permits a child of tender age to give evidence without taking an oath or affirmation but before the reception of

such evidence, the child must promise to tell the truth to the court and not to tell lies. On several occasions, the Court had noted that the provisions of section 127 (2) of the Evidence Act does not provide a procedure of ascertaining whether a child witness should be permitted to promise to tell the truth to the trial court or allowed to testify under oath or affirmation. For instance, in **Issa Salum Nambaluka v. The Republic**, Criminal Appeal No. 272 of 2018 (unreported), the Court was dealing with akin situation where a child of 14 years gave her evidence on affirmation but the record did not reflect as how the trial court concluded that the child witness was competent and capable to testify under oath. It stated as follows on the proper procedure to be adopted by the trial court when faced with a child witness of tender age: -

> *"From the plain meaning of the provisions 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 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 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.*

Section 127 of the Evidence Act is however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not.

It is for this reason that in the case of ***Geoffrey Wilson v. Republic****, Criminal Appeal No. 168 of 2018 (unreported), we stated 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. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies.****" (Emphasis is added)*

In the present appeal, it is on record that PW1 was a child of tender age. The age was proved by PW1 herself when she was giving her personal particulars to the trial court before the reception of her evidence. She told the trial court that she was 14 years. There is also the evidence of her mother, PW3 who told the trial court that PW1 was aged 13 years. After PW1 had

given her personal particulars and the trial court became aware that PW1 was a child of tender age, instead of putting questions to the child witness to satisfy itself as to whether or not the child understood the nature of oath, it proceeded to affirm the witness and thereafter, received her evidence. As it was in **Issa Salum Nambaluka** (supra), the record in this appeal is silent as to how the trial court reached to a conclusion that PW1 possessed sufficient intelligence to justify the reception of her evidence upon affirmation. Since the record is silent, we find that the recording of PW1's evidence was in contravention of the provisions of section 127 (2) of the Evidence Act. In that regard, we entirely agree with the submissions of the learned Senior State Attorney that the affirmed evidence of PW1 was invalid with no evidentiary value. Consequently, we disregard it.

Having discarded the evidence of PW1, we proceed to assess whether the remaining evidence is sufficient to warrant and uphold the conviction against the appellant. We have done so in the case of **Masoud Mgosi v. The Republic**, Criminal Appeal No. 195 of 2018 (unreported) where after expunging the evidence of PW1 for being invalid, the Court considered whether the remaining evidence suffices to connect the appellant with the charged offence. In that appeal, the trial court conducted a *voire dire* and

received the victim's evidence (PW1) upon oath without there being a finding as to whether the witness had sufficient intelligence for reception of her evidence under oath. The Court observed that the procedure adopted by the trial court was contrary to the dictates of section 127 (2) of the Evidence Act. It thus expunged the evidence of PW1 thus: -

> *"We agree with the learned State Attorney that PW1'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 PW1'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."*

The Court took a similar approach in the case of **Masanja Makunga** (supra) when it was dealing with the evidence of a child witness, PW1 which was received upon oath without there being any preliminary inquiry to assess

whether the child witness possessed sufficient intelligence for reception of her evidence upon oath. It said: -

> *"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."*

The Court then re-evaluated the remaining evidence and noted that there was no any other evidence incriminating the appellant with the charged offence. It thus allowed the appeal, quashed the conviction and set aside the sentence.

In this appeal, as correctly submitted by the learned Senior State Attorney, the evidence of PW2 and PW3 is hearsay evidence because they did not witness the appellant committing the crime. Their account was to the extent that PW1 was sick. She had severe constipation which prompted PW2 to take PW1 to the hospital and then to the police station where PW1 named the appellant in the presence of PW2 and PW3. As such, both PW2 and PW3 heard the ordeal from PW1 but did not witness the appellant committing the offence. Furthermore, although PW4 observed that PW1's anus was open

with some bruises but his evidence falls short of connecting the appellant with the charged offence. In the circumstances, we are constrained to uphold ground one which is sufficient to dispose of the appeal.

Consequently, we allow the appeal, quash the conviction and set aside the sentence. The appellant, **Hassan Yusuph Ally**, is to be released forthwith from custody unless he is held therein for another lawful purpose.

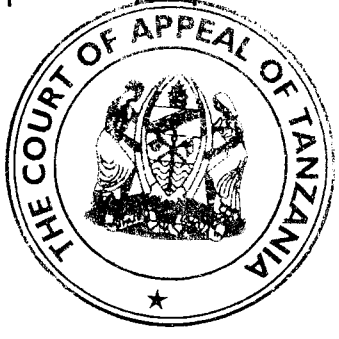
DATED at **DAR ES SALAAM** this 7th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 14th day of September, 2021 in the presence of the Appellant in person and Ms. Nura Manja, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL