IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 294 OF 2018

JOSEPH DAMIAN @ SAVEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Dyansobera, J.)

dated the 30th day of July, 2018
in
Criminal Appeal No. 111 of 2017

.....

JUDGMENT OF THE COURT

12th February, & 2nd March, 2021

MWAMBEGELE, J.A.:

The District Court of Mkuranga sitting at Mkuranga convicted the appellant Joseph Damian @ Savel of the offence of rape contrary to section 130 (1) and (2) (e) and section 131 (1) and (3) of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged that on 17.03.2017 at about 18.00 hours at Vianzi-Changedere area in Mkamba village within Mkuranga District in the Coast Region, the appellant did have carnal knowledge of a girl aged 3 years. We shall simply hereinafter refer to the girl as the

victim. After a full trial which comprised four prosecution witnesses and one defence witness; the appellant himself, the trial court found him guilty, convicted and sentenced him to serve a thirty-year jail term. His first appeal to the High Court was barren of fruit, for, Dyansobera, J. upheld the conviction and sentence meted out to him by the trial court. He has now come to this Court on second appeal still protesting his innocence.

What actually transpired is that on 17.03.2017 at about 11:00 hours in the morning, the appellant who was well acquainted with the victim and her mother Frida Rinus Mponji (PW1), went together with the victim to his *shamba*. PW1 as well went to work in her *shamba* in the vicinity. PW1 returned home at around 14:00 hours but the appellant and the victim were not yet back. They came back a few moments later. The victim looked so tired and she went straight into the house to sleep. She woke up at around 18:00 hours. She was not walking properly and was crying. When her mother (PW1) asked her what had gone amiss, she replied that the appellant had inserted his male organ, which she referred to it as "mdudu", in her vagina. PW1 examined the victim's private parts. She noticed some blood stains and some "dirty substance" in the vagina of the

victim. She suspected that the victim had been raped. She called some neighbours; Athumani and Adolf Mwanuke, to go and witness what she had seen and when they showed up, they also examined the victim and it was established that the victim had been ravished.

PW1 reported the matter to the ten-cell leader and thereafter to the hamlet chairperson and finally to Kimanzichana Police Station where unfortunately nobody was there to attend to them. They thus made a resort to report the matter to Mkuranga Police Station where they were given a PF3. The victim child was taken to Mkamba Health Centre for medical examination where Fatuma Zuberi Kurunga (PW3), an AMO (Assistant Medical officer), medically examined the victim and found that she had bruises in her vagina and had some whitish fluid. However, her hymen was intact. PW3 concluded that there was a slight penetration in her vagina with a blunt object. The appellant was apprehended at 06:00 hours in the following morning and stood trial as described above.

The appellant's appeal to this Court is premised on eight grounds. However, his complaints can be boiled down to only five grounds of grievance; **one**, that the charge was fatally defective for omitting in the

particulars of the offence the word "unlawful" before the words "carnal knowledge"; **two**, that the appellant was not convicted before the sentence was passed against him as required by the mandatory provisions of sections 235 (1) and 312 (2) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA); **three**, that the *voire dire* examination of the victim was conducted contrary to section 127 (2) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (the Evidence Act); **four**, that PW1 was not credible; and **five**, the prosecution did not prove the case beyond reasonable doubt.

When the appeal was called on for hearing on 12.02.2021, the appellant appeared remotely. He was linked to the Court from prison through a video conference. The respondent Republic was represented by Mr. Ramadhan Kalinga and Ms. Chesensi Gavyole, learned State Attorneys.

When we gave the appellant the floor to argue his appeal, fending for himself, he did no more than adopting his two memoranda of appeal; the first one titled "Memorandum of Appeal" and the other one titled "Supplementary Memorandum of Appeal". Having so done, he preferred to

hear the learned State Attorney respond after which, need arising, he would make a rejoinder.

Responding, Mr. Kalinga expressed his stance at the very outset that the respondent Republic supported the appeal. He predicated his support on, mainly, the ground that the *voire dire* examination of the victim was improperly conducted thus flouting the provisions of section 127 (2) of the Evidence Act. He submitted that the section, as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 - Act No. 4 of 2016 (henceforth Act No. 4) which came into force on 08.07.2016, provides in effect that a child of tender years may give evidence without oath but before doing so he must promise to tell the truth and not to tell lies. That was not done in the present case and thus the evidence of the victim could not be relied upon to found a conviction, he submitted. To reinforce this proposition, he cited to us our decision in **Faraji Said v. Republic**, Criminal Appeal No. 172 of 2018 (unreported) in which we expunged evidence of a child of tender years which contravened the provisions of section 127 (2) of the Evidence Act. The learned State Attorney thus urged us to follow suit by expunging the testimony of the victim from the record

of appeal. Having so done, the remaining evidence will not suffice to mount a conviction of the appellant, he contended. He thus implored us to allow the appeal and set the appellant free.

Given the respondent's rebuttal to his appeal, the appellant did not have much to say. He just joined hands with the learned State Attorney and asked the Court to release him from prison.

Having scanned the record of appeal in the light of the conceding arguments by parties to this appeal, we think, as rightly pointed out by the learned State Attorney, this appeal can be disposed of on only the ground challenging the *voire dire* examination.

Our starting point will be the provisions of section 127 (2) of the Evidence Act, as amended by section 26 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016. These provisions, as they stand today and at the time of the commission of the offence, read:

> *"(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 any lies."*

Adverting to the case at hand, it is apparent on the record of appeal that before taking the evidence of the victim witness whose age was tender, the trial court purported to conduct a *voire dire* test to verify whether she could testify. We wish to state that the trial magistrate used a procedure which was obsolete. That procedure obtained before the amendments effected to section 127 (2) of the Evidence Act by Act No. 4 of 2016. We will let the record of appeal speak for itself as appearing at p. 13 of the record of appeal:

> *"PW2: [Name withheld], 3 years*
>
> *Court: As far as the age of PW1 is concerned the voire dire test should be conducted as per the requirement of section 127(2) of the TEA [Cap. 6 R.E 2002].*
>
> *Sgd. T. G. BARNABAS*
>
> *RM*
>
> *1/6/2017*
>
> ***VOIRE DIRE TEST CONDUCTED***
>
> *QN: What is your name?*
>
> *ANS: My name is [Name withheld]*

QN: How old are you?

ANS: I am 3 years

QN: What is your father's names?

ANS: My father's name is Michael

QN: What is your mother's name?

ANS: My mother's name is Mama [Name withheld]

QN: Where do you live?

ANS: I live at home.

QN: Are you a student?

ANS: No, I am not a student

QN: Which Religion are you?

ANS: I don't know

QN: Do you know about telling the trues

ANS: Yes, my mother teaches me about telling the truth

QN: What advantage did you get to tell the truth?

ANS: I will get an award"

Then the trial magistrate, at the same p. 13, made the following finding:

> *"**COURT FINDING***
>
> *PW2 does not understand the nature of an oath, although she has sufficient intelligence of understanding to answer question put to her ordinarily. Hence her evidence is hereby recorded without an oath as per section 127 (2) of the TEA [Cap. 6 R.E 2002]*
>
> *Sgd. T.G. BARNABAS*
>
> *RM*
>
> *1/6/2017"*

We have alluded to above that the procedure opted by the trial magistrate was the one before the amendment. We think it is apt to demonstrate here. Before the amendment, in compliance with the provisions of subsection (2) of section 127 of the Evidence Act, the courts used to conduct a *voire dire* examination to test; **one**, whether the witness whose age was tender understood the meaning of oath, **two**, if he had sufficient intelligence for the reception of his evidence and, **three**, if he

understood the duty of speaking the truth. After the amendment already referred to hereinabove, what remained relevant was the child of tender years to swear or, if not, only promise to tell the truth to the court and not to tell lies. The victim in the case at hand, as already reproduced above, did not, or was not led to, do that. That is, did neither swear nor promise to tell the truth to the court and not to tell lies. That aspect did also not come out in the *voire dire* conducted. Her testimony was therefore unqualified to mount a conviction; it ought to have been discarded. We have heard times without number that evidence of a child whose age is tender and which is received without complying with section 27 (2) of the Evidence Act, lacks probative value and must be discounted – see: **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018, **Msiba Leonard Mchele Kumwaga v. Republic**, Criminal Appeal No. 274 of 2018, **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018, **Selemani Bakari Mkota @ Mpale v. Republic**, Crim Appeal No.269 of 2018 and **Shaibu Nalinga v. Republic**, Criminal Appeal No. 34 of 2019 (all unreported), to mention but a few.

The question coming to the fore after the above conclusion is whether there remained other evidence upon which to mount a conviction against the appellant. We wish to state at this juncture that we are alive to the position of the Court that an accused person may be convicted even without the testimony of the victim of the offence – see: **Abdallah Elias v. Republic**, Criminal Appeal No. 115 of 2009, **Haji Omary v. Republic,** Criminal Appeal No. 307 of 2009, **Fuku Lusamila v. Republic**, Criminal Appeal No. 12 of 2014 **Khamis Samwel v. Republic**, Criminal Appeal No. 320 of 2010 and **Harrison Mwakibinga v. Republic**, Criminal Appeal No. 196 of 2009 (unreported); the decisions we cited in **Issa Ramadhan v. Republic**, Criminal Appeal No. 409 of 2015 (also unreported).

In the case at hand, we have addressed our mind to the question whether there is remaining evidence against the appellant. After discounting the evidence of the victim, there only remains the evidence of the victim's mother (PW1). She testified that the victim returned home with the appellant a few moments after she arrived at around 14:00 hours and that she (the victim) looked tired. The victim went straight to sleep and woke up at about 18:00 hours only to complain upon inquiry that the

appellant had ravished her. We have subjected the evidence of PW1 to a proper sieve it deserves. Having so done, we are doubtful if it can be taken to prove that the victim was raped by the appellant. It does not come out clearly in evidence whether she was raped before the arrival at around 14:00 hours or when she was inside the house where she had gone to sleep on arrival. Simply put, no explanation is given what transpired in the duration of four hours between around 14:00 hours when the victim came back with the appellant and 18:00 hours when she woke up crying and walking abnormally. We think there is doubt and our criminal parlance directs us to be resolved in the appellant's favour.

We are of the considered view that this ground alone resolves the appeal. We thus find no need to determine the remaining grounds as that would be but an academic exercise. We reserve the determination on the remaining grounds for some other opportune moment.

In the upshot, we find merit in this appeal and allow it. Consequently, we quash the conviction of the appellant and set aside the sentence meted out to him by the two courts bellow. We order that the

appellant Joseph Damian @ Savel be released from prison forthwith unless held there for some other lawful cause.

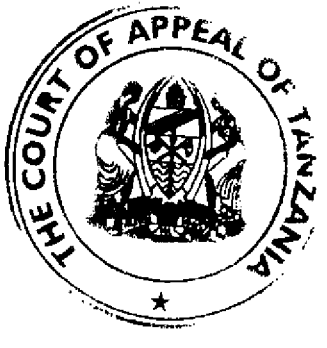
DATED at **DAR ES SALAAM** this 26th day of February, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 2nd day of March, 2021 in the presence of the Appellant linked to the court by video conference from Ukonga Prison and Ms. Monica Ndakidemi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL