IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 498 OF 2020

JOHN MKORONGO JAMES ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Rwizile, J.)

dated the 26th day of August, 2020
in
(DC). Criminal Appeal No. 103 of 2020

JUDGMENT OF THE COURT.

16th February, & 11th March, 2022

MWAMPASHI, J.A.:

In Criminal Case No. 578 of 2019, before the District Court of Kinondoni at Kinondoni (the trial court), the appellant, John Mkorongo James was charged and convicted of unnatural offence contrary to section 154 (1)(a) and (2) of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019] (the Penal Code). It was alleged before the trial court that on diverse dates between 30th August, 2019 and September, 2019 at Sinza Mori area within the District of Kinondoni in Dar es Salaam Region, the appellant did have carnal knowledge against the order of nature to a ten (10) years old boy

whom we shall henceforth refer to as "PW1" or "the Victim" in order to conceal his identity.

After the conviction, the appellant was sentenced to thirty years imprisonment. If we may pause here a little, we note that the sentence imposed by the trial court is illegal. Where conviction is properly grounded on the offence of unnatural offence against a child under the age of eighteen, the punishment, under section 154 (2) of the Penal Code, is life imprisonment. Since in the instant case PW1 was ten years old then the proper sentence which ought to have been imposed is life imprisonment.

Aggrieved by the conviction and sentence, the appellant unsuccessfully appealed to the High Court. Still protesting his innocence, the appellant has now come to this Court on a second appeal.

To prove the case against the appellant, the prosecution paraded a total of seven (7) witnesses whose evidence, albeit in brief, is as follows; PW1 and the appellant used to know each other well because they were neighbours. The appellant was also a father of one Brian who was PW1's friend. According to PW1's unsworn evidence, on a day which he could not remember but when it was during school midterm break, he went at the appellant's house to watch televition. At around 18.00 hours when he was about to leave, the appellant sent Brian for an errand and asked PW1 not to

leave. Thereafter, he grabbed and took him to his bedroom where he sodomised him. After he had completed his mission, the appellant gave PW1 TZS 1,000.00. Upon getting back home his sister Josephine Steven (PW2) saw him with the money. When asked by PW2 about the money, PW1 named the appellant as the one who had given it to him. Some days later after the mid term break had ended, PW1 revealed to his teacher Rogate Minja (PW7) that he was sodomised by one uncle John during the midterm break. Upon being so informed, PW7 relayed the information to PW1's family members.

According to PW2, on 19.09.2019 she received a message from PW7 through PW1 which was to the effect that she should go and see him. She followed PW7 and was informed by him that PW1 had told him that he had been sodomised by one uncle John during the midterm break. Since PW2 knew who is uncle John, she passed the news to their grandfather with whom she and PW1 were staying as well as to their aunt Zena Iddi Kasongo (PW3) who on the next day asked one Haruna Issa (PW4) to take PW1 to the hospital for medical examination. PW3 did also assist the police to arrest the appellant.

Other prosecution witnesses included a police officer No. E 1030 Stg. Rashidi (PW5) of Kijitonyama Police Station whose evidence was simply to

the effect that being led by PW3, he arrested the appellant on 21.09.2019. Dr. Gloria Lema testified as PW6 telling the trial court that she medically examined PW1 on 20.09.2019 and observed that PW1 had bruises on his anus and that his sphincter muscles were loose. To that effect, PW6 tendered a PF3 which was admitted in evidence as exhibit P1.

The appellant defended himself on oath as DW1 and had three witnesses supporting him. He firstly denied to have committed the offence. He then told the trial court that at the material time he used to work with an institution called the Management and Development for Health as an officer dealing with logistics. He further testified that from the nature of his job which used to keep him away from home for the whole day from 07.00 hours to around 20.00 hoursT, he could not have committed the offence at 18.00 hours. The appellant further told the trial court that he used to live with his sick mother who was at home almost all the time as well as his son Brian and his nephew Faraja Kalanje (DW4) with whom he shared the bedroom. He also testified that there were two women who used to cook and sell food outside his house hence causing the home busy and occupied almost the whole day. In support of his defence that he could not have been home on the material time, the appellant tendered the office log book as exhibit D2. Two food vendors Flora Jacob (DW2) and Mariam Omary (DW3) as well as the appellant's nephew Faraji Kalanje (DW4) stood firm to support

the appellant's defence that the circumstances surrounding the appellant's house and the nature of the appellant's job could not have allowed the offence to be committed by the appellant at the material time and in the appellant's bedroom.

Having heard the evidence from both sides, the trial court found that the evidence from PW1, being evidence from the victim, was true and the best one. It was also found that PW1's evidence was corroborated by the evidence from PW2 who saw PW1 with the TZS 1,000.00 that had been given to him by the appellant, PW6 who medically examined PW1 and found him with bruises in his anus and also by the PF3 and PW7 to whom the case was revealed by PW1. The appellant's defence was rejected for being nothing but full of lies. The trial court did therefore find the case against the appellant proved to the required standard and proceeded to convict and sentence the appellant as indicated above. On first appeal to the High Court, the findings and decision of the trial court were confirmed hence this second appeal.

Two memoranda of appeal comprising a total of thirteen grounds were filed. The first one was filed 10.02.2021 while the second was lodged on 02.03.2021. We have carefully examined the thirteen grounds of appeal raised and found that the grounds can conveniently be paraphrased to the

following five (5) grounds; **One,** that PW1's evidence was recorded in contravention of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019] (the Evidence Act); **Two**, that the evidence on record was not properly evaluated; **Three**, that the evidential burden was shifted to the appellant; **Four**, that the defence evidence was not considered; **Five**, the doubts in the prosecution evidence were not resolved in the appellant's favour.

At the hearing of the appeal, the appellant was represented by Messrs. Peter Kibatala and Nehemia Nkoko, learned advocates whilst Ms. Sylvia Mitanto, learned Senior State Attorney, who was assisted by Ms. Monica Ndakidemi, learned State Attorney, appeared for the respondent Republic.

Arguing for the appeal, Mr. Kibatala began by adopting the two memoranda of appeal as well as written statement of arguments in support of the appeal, the appellant had earlier filed on 01.04.2021 in terms of rule 74 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He then submitted that section 127 (2) of the Evidence Act was not complied with because before taking the evidence of PW1 no examination was conducted by the trial court on PW1 to test his competence and whether he knew the meaning and nature of an oath. It was argued by Mr. Kibatala that the trial court jumped to the conclusion that PW1 has promised to tell the truth, without first having tested the competence of PW1. He further contended

that the failure by the trial court to conduct an exercise of examining and testing not only the competence of PW1 but also if he knew the meaning of an oath, fatally contravened section 127 (2) of the Evidence Act rendering the evidence by PW1 valueless. To buttress his argument, Mr. Kibatala referred the Court to the cases of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 and **Faraji Said v. Republic**, Criminal Appeal No. 172 of 2018 (both unreported).

Mr. Kibatala further submitted that since in sexual offences the best evidence is that which comes from the victim, in the absence of the evidence from PW1, the remaining evidence which is nothing but mainly hearsay is insufficient to warrant the appellant's conviction. He therefore argued that, since the first ground sufficiently disposes of the appeal, the appeal can be allowed on that sole ground without considering the remaining grounds.

Responding to the above arguments on the first ground of appeal, Ms. Mitanto was of the view that section 127 (2) of the Evidence Act was not violated. She argued that PW1 who was ten years old was required in terms of section 127 (2) of the Evidence Act to promise to tell the truth and not lies, which he did as shown at page 9 of the record of appeal. Ms. Mitanto further contended that the failure by the trial court to show and put on record how it came to the conclusion that PW1's evidence would be received

after the promise to tell the truth and not lies is made, was not fatal as the same was not the requirement of the law.

Since the first ground of appeal appears to be the central issue in the instant appeal, we find it apposite to consider it first. Admittedly, before concluding that PW1 had promised to the court to tell the truth, the trial court did not first examine PW1 to test his competence and whether he knew the meaning and nature of an oath. After PW1's personal particulars had been recorded, and after the trial court became aware of PW1's tender age, instead of firstly examining him as to whether he understood the meaning and nature of an oath or not, the trial court jumped to the conclusion that PW1 understood the duty of telling the truth, that he had promised to tell the truth and then it proceeded to receive PW's unsworn evidence.

It is in the light of the above situation, that Mr. Kibatala for the appellant, complained that PW1's evidence was taken in violation of section 127 (2) of the Evidence Act. On the other hand, it is Ms. Mitanto's stand that such omission is not fatal as the same is not a requirement of the law. From the above rivalry arguments, our task in determining the first ground of appeal is narrowed down to two issues; **first**, whether examining a child witness of tender age on his/her competence and whether he/she knows the

meaning and nature of an oath so that if not, to let him/her testify on the promise to the court to tell the truth and not tell lies, is a requirement of the law or not and **second**, whether the omission to do so is fatal.

It should also be borne in mind that in determining the above two issues, regard shall have to the settled principle of law in regard to the Court's limited power in interfering with the concurrent findings of the courts below unless the same are based on misapprehension of the evidence or misdirection causing miscarriage of justice. See– **Mbaga Julius v. Republic**, Criminal Appeal No. 492 of 2015 (unreported).

Before venturing into the above posed issues, we should first, for the sake of appreciating what transpired on 21.11.2019 before PW1's unsworn evidence was recorded, reproduce the relevant trial court's proceedings as shown at page 9 of the record of appeal:

> *"**PROSECUTION CASE OPENS***
> ***The Victim (PW1)** 10 years old, Resident of Mwananyamala, student at Mapambano, Mluguru by tribe:*
> ***COURT***
> *PW1 Promises that he can tell the truth, and understand the duty of tellIng the truth".*

Further, section 127 (2) of the Evidence Act of which it is complained was contravened, provides as follows:

"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"

We should begin with the first issue on whether it is a requirement of the law for a child witness of tender age, to firstly be examined to test his competence and know whether he/she understands the meaning and nature of an oath before it is concluded that his/her evidence is to be recorded after giving a promise to the court to tell the truth and not tell lies. Luckily, this is not the first time the Court is faced with the issue. The answer to the said issue in the light of section 127 (2) of the Evidence Act, was positively given by the Court in the case of **Godfrey Wilson** (supra) where it was held, among other things, that:

"The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 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 a 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 foilows:

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 promises must be recorded before the evidence is taken".*** [Emphasis added]

See- also Issa **Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018**, Hamisi Issa v Republic**, Criminal Appeal No. 274 of 2018 and **Jafari Majani v. Republic**, Criminal Appeal No. 402 of 2019 (all unreported). In the latter case, the Court stressed on the import of section 127 (2) of the Evidence Act by stating that:

"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 light of the above authorities, the argument by Ms. Mitanto that it is not a requirement of the law for a child witness of tender age to firstly be examined so as to test his competence and know whether he/she understands the meaning and nature of an oath before he is required to testify on the promise to the court tell the truth and not tell lies, is unfounded. The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court tell the truth and not to tell lies. It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court tell the truth and not tell lies. It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the court tell the truth and not tell lies before they testify. This is the reason why any child of tender age who is brought before the court as a witness is required to be examined first, albeit in brief,

to know whether he/she understands the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the promise to the court tell the truth and not tell lies as per section 127 (2) of the Evidence Act.

We have also observed that besides the omission or failure by the trial court to have first examined PW1 to test his competence and know if he understood the meaning and nature of an oath before jumping to the conclusion that PW1 would give unsworn evidence on the promise to the court to tell the truth, PW1's promise was incomplete and it was in form of an indirect or reported speech instead of a direct speech. It was incomplete because while section 127 (2) of the Evidence Act, require that the promise should be in telling the truth and not telling any lies, what PW1 is said to have promised is only to tell the truth. He did not promise not to tell any lies. It is recommended that the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete.

Regarding the second issue, the position is already settled. The omission to conduct a brief examination on a child witness of a tender age to test his competence and whether he/she understands the meaning and nature of an oath before his/her evidence is taken on the promise to the court to tell the truth and not tell lies, is fatal and renders the evidence

valueless. In **Hassan Yusuph Ally v. Republic**, Criminal Appeal No. 462 of 2019 (unreported), where the trial court record was silent as to how the trial court reached at a conclusion that PW1 possessed sufficient intelligence to justify the reception of her evidence upon affirmation, the Court observed that:

> *"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 State Attorney that the affirmed evidence of PW1 was invalid with no evidential value. Consequently, we disregard it".*

In another case of **Faraja Said** (supra), the Court having found that the questions asked to the child of tender age in probing his competence to testify within section 127 (2) of the Evidence Act, were wanting and insufficient, proceeded to state that:

> *"To us, like the appellant and the learned State Attorney, the questions asked by the trial magistrate did not satisfy the requirement of section 127 (2) of the Evidence Act. This was violation of the settled principle under section 127 (2) of the Evidence [Act] which justify for our interference of the concurrent findings of the two courts below. We therefore fully concur with the submission made by Mr. Kalinga that*

the evidence of PW1 does not have evidential value, it ought, and we hereby do, expunge that evidence from the record".

In the instant case, as we have amply demonstrated above, PW1's evidence was taken in contravention of section 127 (2) of the Evidence Act. That being the case, the said evidence is valueless and it is accordingly expunged from the record. In the event, we find the first ground of appeal to be meritorious and we accordingly sustain it.

Having expunged the evidence of PW1 from record, the question that follows is whether the remaining evidence is sufficient to support the appellant's conviction. We have dispassionately examined the remaining evidence and observed that, as rightly argued by Mr. Kibatala, the said evidence is insufficient and cannot warrant the appellant's conviction. The evidence from PW2, PW3, PW4 and PW7 is wholly hearsay and is incapable of incriminating the appellant of the offence charged. No one saw the appellant committing the charged offence. Likewise, the evidence from PW6 and from the PF3 which is to the effect that there were bruises in PW1's anus only prove that PW1's anus was penetrated . It does not prove that it was the appellant who penetrated him. Lastly, the evidence from PW5 is just on how the appellant was arrested.

Since the above findings suffice to dispose of the appeal, the rest of the grounds of appeal die naturally. In the circumstances, we allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant. It is ordered that the appellant John Mkorongo James be set at liberty immediately unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 4th day of March, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 11th day of March, 2022 in the presence of Appellant through Video Conference from Ukonga Prison, Nura Manja State Attorney for Respondent and in the absence of Mr. Peter Kibatala though dully notified is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL