IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 120 OF 2020

ISSA AMIR @ KOSHUMA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(***Mgonya*, J.**)

dated 10th day of February, 2020

in

Criminal Appeal No. 252 of 2018

.....

JUDGMENT OF THE COURT

7th February & 16th March 2022

LILA, JA:

ISSA AMIR @ KOSHUMA, the appellant, was initially acquitted by Temeke District Court of the offence of unnatural offence contrary to section 154 (1) (a) of the Penal Code, Cap. 16 R.E 2002 [Now R: E 2019]. On appeal to the High Court by the respondent Republic, he was convicted and sentenced to serve life imprisonment. He now appeals against that decision.

Before the District Court of Temeke (the trial court) it was alleged by prosecution that on 19th July, 2015 at Njaro Street within Temeke District the appellant had carnal knowledge against the order of nature of a boy aged 11 years who we shall refer to him as the Victim or PW1 to camouflage his identity. He was acquitted on the ground that the prosecution failed to prove its case beyond reasonable doubt. The Director of Public Prosecutions (the DPP) was aggrieved. He successfully appealed to the High Court, which quashed and set aside the appellant's acquittal order. Instead, it found the appellant guilty, convicted him and sentenced him to serve life imprisonment.

As would definitely be expected, the High Court decision aggrieved the appellant who, as a consequence, preferred the present appeal.

The case for the prosecution as built by six (6) witnesses is straight forward. On 19/7/2015 was an Islamic holiday famously known as Eid day. Zaika Rashid (PW3) and her two sons namely PW1 and Anwari Alii (PW2) were at home. A phone call from a person who turned out to be the appellant rang asking PW1 (the victim) to go to his home to take some money for the festival. The appellant was referred to as uncle. PW3, at first, allowed PW1's young brother Anwar (PW2) to go to his uncle and

collect the money. But, on reflection, she later allowed PW1 to accompany PW2. The appellant stayed a bit distant place from PW3's home but within Njaro Street.

Upon arrival, the appellant sent PW2 to his grandmother to deliver a bottle whilst PW1 remained with him. Later on, the appellant sent PW1 to buy a voucher but found the shop closed. By then other people who were outside the appellant's house had left. They remained alone in the room and while the door was half open, the appellant told him (PW1) to undress, then he put on a condom and inserted his penis into his anus (mdudu) something which caused him to experience pains. Suddenly, PW2 arrived and noted what was happening and he rushed to PW3 whom he reported the matter. At home, PW1 explained the whole ordeal and unveiled that to be the fifth time the appellant had done so as he did so even at the "chuo" and in a taxi which the appellant was driving but was afraid to report it because the appellant threatened him not to do so.

The incident was reported to Chang'ombe Police Station where they were issued with PF3 and the victim was sent to hospital where upon being medically examination by one Stanley Jotham (PW6), a Medical Assistant, it was found that PW1's anus had bruises and it was loose something that

suggested a blunt object had penetrated it. Those findings were endorsed in the PF3 which was tendered and admitted as exhibit P1 by PW3. The appellant was arrested and was arraigned in court.

The appellant, the only defence witness, refuted the accusation alleging that it was a fabrication by the victim's mother (PW3). He associated the accusation with the grudges PW3 had harboured against him founded on three reasons. **One**; he refused to marry her younger sister because she was of a different religious faith and not according to good morals as she wore a tight trouser. **Two**; he turned down her offer to have sexual intercourse in her room after she had lured him to assist in hunting for a rat and having taken off her clothes and sent away her children. And, **three**; that he refused to assist her in catching up her husband who had affairs with another woman.

As regards PW1 and PW2 visiting his place on the fateful day, the appellant admitted it but stated that they were sent to him by their mother and he gave PW1 money to take the same to his mother. He stated further that he was later on phoned by PW3 who lamented that he had made her son a woman in that "ninamfanyaga kila siku kwenye haja kubwa" (literally

meaning that he used to have carnal knowledge of PW1 against the order of nature every day). Following that he went to meet PW3 who insulted him accusing him that "mimi ni mshenzi, pumbavu na sina hela" (literally meaning that he was indecent, foolish and a poor man) to which accusation he did not respond but told her to take PW1 to hospital for medical examination. He firmly denied penetrating PW1 five times, such an act cannot be done in a *madrasa*, he did not use condom and he did not threaten to kill PW1.

The trial court, at the conclusion of the trial, found the prosecution case wanting. Two reasons were advanced. **One**; the defence evidence casted doubts on the possibility of the alleged offence being committed and, **two**; due to loss of exhibit P1 which was removed from the case file, penetration was not proved. It accordingly acquitted the appellant.

The respondent Republic, as stated above, appealed to the High Court upon three grounds of appeal in which he faulted the trial magistrate for acquitting the appellant after relying on the prior conflict between the appellant and the victim's family, disappearance of the PF3 (exhibit P1)

from the court file and a wrong finding that the case was not proved by the prosecution beyond doubt.

In overturning the decision of the trial court, the learned presiding judge seriously considered the issue whether the evidence produced sufficiently proved that the victim was carnally known against the order of nature by the appellant.

In her findings, the learned presiding judge was convinced that PW1's evidence, being the victim, was clear that he was penetrated by the appellant and that his testimony was dully corroborated by PW2 who eye-witnessed the incident and reported it to his mother (PW3) and also the evidence by PW6 who medically examined him. She relied on the Court's pronouncements in **Mathayo Ngalya @ Shabani v Republic**, Criminal Appeal No. 170 of 2006 (unreported) on proof of penetration and **Godi Kasenegala v. Republic,** Criminal Appeal No. 10 of 2008 (unreported) on the legal position that in sexual offences proof of penetration comes from the victim himself. As for the loss of exhibit P1, the learned judge held that it was the court's duty to keep them in safe custody hence causing it to disappear is a suicidal act. She went further to find that notwithstanding its

loss, PW6's oral account in court of what he observed when he medically examined PW1 proved penetration by a blunt object. To her, the defence evidence could not convincingly shake the prosecution evidence by PW1, PW2, PW3 and PW6. At the end, she quashed and set aside the order acquitting the appellant and substituted it with an order convicting him and then sentenced him to the statutory sentence of life imprisonment.

The conviction and sentence aggrieved the appellant who has preferred this appeal predicated on seventeen grounds of grievances. We also acknowledge that the appellant also lodged written arguments in support of the grounds of appeal together with a list of authorities. We have also noted that despite his indication that he was amplifying the grounds in the manner set forth in the memorandum of appeal, such is not the case. His written arguments addressed the appeal grounds generally. However, upon our close examination, we are satisfied that the determination of the appeal turns on the competence of PW1 and PW2 to testify before the trial court. This complaint is a subject of the appellant's complaint in ground one (1).

We will first discuss a closely related question of the age of PW1 and PW2 not being sufficiently proved as complained in ground 5 of appeal. According to the appellant, a birth certificate or a hospital clinic card was necessary. Although the issue escaped the mind of the learned Senior State Attorney hence did not argue on it, this Court has consistently maintained that evidence as to proof of age may be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate (See **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 and **Issa Reji Mafita v. Republic**, Criminal Appeal No. 337 'B' of 2020 (both unreported).

In the present case PW1 and PW2 presented themselves, respectively, as being 11 ½ and 8 years old and PW6, the doctor (a medical practitioner) told the trial court that PW1 was 11 years old when he examined him. Notwithstanding the six months' difference which, in our view is not substantial hence immaterial, PW6 sufficiently proved the age of PW1. It is logically true that PW2, being a younger brother of PW1, was below 11 years. In terms of the provisions of section 127(5) of EA, they

were under the apparent age of fourteen hence were children of tender age. The appellant's complaint is therefore baseless and is dismissed.

Having determined that PW1 and PW2 were children of tender age, their evidence was receivable subject to compliance with the provisions of section 127(2) of the EA before its amendment considering that their evidence was received in November 2015. The issue before us for determination is therefore whether there was full compliance with section 127(2) of the EA in conducting *voire dire* examination to PW1 as complained in ground 1 of appeal. Strictly speaking, the complaint in this appeal is that the questions and answers recorded during *voire dire* examination did not support the finding that he was capable of testifying on oath. As the law stood then, before evidence of a child witness is taken, *voire dire* test was a mandatory requirement in terms of section 127(2) of the EA and the trial magistrate was imperatively required, after conducting *voire dire* test, to indicate on the record whether or not the child understands the nature of an oath, duty of speaking the truth and if he is possessed of sufficient intelligence for reception of his evidence. In the event of positive findings in all aspects, the child's evidence is taken upon

oath and in case the court's findings are that the child does not understand the nature of an oath but understands the duty to tell the truth and is possessed of sufficient intelligence, the evidence is taken but not on oath. Otherwise, where the child failed to meet any of the above conditions, the evidence is not taken.

The record bears out at page 6 that one of the questions PW1 was asked and the response thereof is, we quote:-

> *"What happens if you **speak lies**?*
>
> *"That **is an offence before God.**"*

Then the trial magistrate made this finding:-

> *"**Court**: The court has found the witness to be smart enough to **understand the duty of truth speaking.** Upon oath taking he testifies."* (Emphasis added)

It is plainly clear that PW1 expressed fear to God if he was to tell lies. That was a clear indication that he knew the nature of oath and the duty to tell the truth. The appellant's complaint that the trial magistrate's finding that PW1's evidence could be taken on oath lacked justification is without merit. It is dismissed.

While, on the face of the memorandum of appeal, the above was the appellant's major complaint in his ground 1 of appeal, in the course of amplifying it in his written arguments, he went ahead and introduced two related complaints. Such complaints were that the evidence by PW1 and PW2 was taken without:-

1. The magistrate making a finding whether PW1 possessed sufficient intelligence.
2. The trial magistrate making a finding whether PW2 understands the duty of telling the truth.

Although they might appear new for which, if the appellant had wished to argue them he, under Rule 81(1) of the Tanzania Court of Appeal Rules, (the Rules), ought to have sought leave of the Court to do so, we see no reason why we should not consider them for two reasons. **One**; they were raised in the submission a copy of which was served on the respondent well before the hearing date hence was well aware of it when the case was scheduled for hearing and had enough time for preparation. And **two**; the evidence by the two witnesses was central in grounding the appellant's

conviction. Justice demands such evidence be properly examined so as to ensure that the appellant's conviction was properly founded.

In his submission, the appellant explained that the evidence by PW1 and PW2 was improperly taken because the finding made after the *voire dire* examination did not fully comply with the requirements of section 127(2) of the EA prior to its amendment by The Written Laws (Miscellaneous Amendments) (No 2) Act, 2016 (Act No. 4 of 2016). For purposes of clarity, we find it apt to reproduce the relevant part of his submission thus:-

> *"...as reflected at page 6 and 9 of the record of appeal **firstly**, at page 6 of the record shows clearly that the trial court was only satisfied that PW1 understood the duty of speaking the truth. In the record there was no finding as to whether he was possessed of sufficient intelligence. **Secondly**, the trial court was only satisfied that PW2 had (at page 9) intelligence enough to testify. There was no finding as to whether he understands the duty of telling the truth..."*

In supporting his assertion he referred us to the Court's decision in the case of **Godi Kasenegala v. Republic**, Criminal Appeal No. 10 of 2008 (unreported).

We, indeed, entirely agree with the appellant's submission that, as the law stood before section 127(2) of the EA was amended by Act No. 4 of 2016 which came into force on 8/7/2016 required any trial court before receiving the evidence of a child of tender age to first satisfy itself whether such witness is competent to testify. That procedure was, in legal parlance, known as *voire dire* examination. The need to comply with that procedure was explained in **Mohamed Sainyenye v. Republic,** Criminal Appeal No. 57 of 2010 (unreported). In that case the Court said:

> *"Before the evidence of a child of tender age is taken, the procedure laid down under s. 127(2) of the Evidence Act must be followed to ascertain whether such witness is competent to testify on oath or affirmation or not on oath or affirmation. In legal parlance the procedure to ascertain whether a child of tender age is competent to testify is known as voire dire. So, the object of conducting a voire dire test is to establish competency of a child whether he is capable of testifying. In case it is*

found he is not capable of giving evidence either on oath/affirmation, then his evidence should not be taken. ***The finding on these points must be recorded on the case record****".* [Emphasis added].

The purpose of conducting *voire dire* examination was categorically stated by the erstwhile Court of Appeal for Eastern Africa in **Nyasani Bichana v. R** [1958] EA 90 that:-

> *"It is clearly the duty of the court under that section to ascertain, first whether a child witness* ***understands the nature of oath****, and, if the finding on this question is in the negative,* ***to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence*** *and* ***understands the duty of speaking the truth****. This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there has been a due compliance with the section."* (Emphasis added)

With the foregoing exposition of the law, therefore, the conduct of ***voire dire*** examination was intended to test; **one**, competence to testify

in that whether the child witness is able to understand questions put to him and give rational answers; **two**, oath test, that is whether he/she can give evidence on oath or affirmation or not, and **three**, truthfulness that is, if he understands the duty to tell the truth and not lies. In the event the court is satisfied that the child witness is not capable of giving evidence, then his evidence should not be taken whether it be on oath/affirmation or at all (See **Mohamed Sainyenye v. Republic** (supra).

The situation which we are faced with is materially analogous to the question which the Court had to grapple with in the case of **Maneno Katuma v. Republic**, Criminal Appeal No. 1 of 2012 (unreported). In that case the trial magistrate proceeded to receive the evidence of PW1, a ten years old witness, without first determining if he was "possessed of sufficient intelligence to justify the reception of his evidence". The Court held that to be a fatal irregularity. As the evidence was improperly received, it expunged the same from the record of appeal.

With the above legal foundation, the first limb of the appellant's complaint is resolved in the positive. Since at the time PW1 gave evidence on 2/11/2015 he was a child of tender age and there was no indication on the record by the trial magistrate that he possessed sufficient intelligence

to testify, then the trial court was precluded from receiving his evidence. The purported evidence on record at pages 6 and 7 is hereby expunged from the record.

We now turn to the evidence by PW2. The record bears out at page 9 of the record that upon conclusion of the *voire dire test*, the trial magistrate made this finding:-

> *"**Court**: The child is inteiligent enough to testify."*

The above recorded finding by the trial magistrate lacks two very crucial elements whether PW2 understood the nature of an oath and whether he understood the duty of speaking the truth. He could not have, therefore, testified whether on oath or not. Although, his evidence was received not on oath, the anomaly was not thereby cured. For that reason his testimony is equally hereby expunged. We are reinforced in that stance by our decision in **Hassan Hatibu v. Republic**, Criminal Appeal No. 71 of 2002 (unreported) where, with lucidity, the Court observed that:-

> *"From these provisions, it is important for the judge or magistrate when the witness involved is a child of tender age to conduct voire dire examination. This is to be done in order for the trial judge or magistrate to satisfy himself or herself that child*

understands the nature of oath. If in the opinion of the judge or magistrate, to be recorded in the proceedings, the child does not understand the nature of an oath but is possessed of sufficient intelligence and the witness understands the duty of speaking the truth, such evidence may be received though not upon oath or affirmation."[See ***Dhahiri Ally v. R*** *[1989] TLR 27;* ***Sakila v R*** *(1967) EA 403;* ***Khamisi Samwel v. R,*** *Criminal Appeal No. 320 of 2010 (unreported);* ***Kisiri Mwita s/o Kisiri v. R*** *[1981] TLR 218 and* ***Kibangeny v. R*** *[1959] EA 94]" [Emphasis added]*

We note, from the above excerpt, that even a child witness who does not understand the nature of an oath or affirmation can testify only if the trial judge or magistrate satisfies himself that he understands the duty of telling the truth and his evidence shall be taken not on oath. We shall go along with the position and hold that the evidence by PW2 was wrongly received in the absence of any indication on the record that the trial magistrate satisfied himself that he understood the duty of telling the truth.

It is noteworthy, perhaps, that central to the child witness's competence to testify was possession of sufficient intelligence and

understanding of the duty to speak the truth. A child witness would be competent to testify only if the trial court was satisfied that both conditions were met. As to whether the testimony would be taken on oath or not, the test was whether the witness understood the nature of an oath. The need for conducting an inquiry, making findings and consequences of failure to do so was lucidly explained by the Court in in the case of **Mohamed Sainyenye v. Republic** (supra) when considering the testimony of a child who was 10 years (PW2) and after finding that the *voire dire* examination was inadequate the Court stated that:-

> *"In the absence of an inquiry and a* ***findlng that the chiid understands the nature of an oath or he Is possessed of sufficient intelligence and understands the duty of speaking the truth, It cannot be said that the child was a competent witness****. The evidence of PW2 Is of no value...was wrongly admitted and acted upon. The same is expunged from the record."* (Emphasis added)

Before we conclude our discussion on section 127(2) as it were its amendment, we wish to seize this opportunity to make one observation in

answering the contention by the learned Senior State Attorney that upon finding that there were deficiencies in conducting *voire dire* test then we should treat the evidence by PW1 and PW2 as unsworn evidence. The appellant's complaint, as demonstrated above, was based on the competence of PW1 and PW2 to testify. The question of treating certain evidence unsworn does not arise where the witness is found to be incompetent to testify, as is the case herein. The position is as if no evidence was received. The position would be different if the issue involved was in respect of improper conduct of *voire dire* test or a complete omission to do so. The legal position on those two situations was that the evidence of a child is reduced to unsworn evidence which required corroboration. [See the decision of the full bench in **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported) where the Court endorsed the position it took in the case of **Nguza Viking @ Babu Seya and 3 Others v. Republic**, Criminal Appeal No. 56 of 2005 (Unreported)]

There can be no doubt, in the instant case, that the evidence by PW1 and PW2 formed the basis of the appellant's conviction which was crucial for the prosecution case. PW1 is the victim whereas PW2 claimed to have witnessed the incident of PW1 being carnally known against the order of

nature by the appellant. Their respective testimonies were crucial in establishing who inserted a male organ into PW1's anus. After we have expunged such evidence, the question now is whether the remaining evidence could ground the appellant's conviction. The testimony by PW6, standing alone, at most, establishes penetration but not the ravisher or perpetrator. The evidence by PW3, PW4 and PW5 remained to be hearsay. Therefore, evidence linking the appellant with the commission of the offence is conspicuously missing. It is therefore our conviction that had the first appellate court addressed its mind on these procedural anomalies, it would have not sustained the appellant's conviction.

The findings on these two grounds sufficiently dispose of the appeal with the consequence that we see no compelling reasons to delve into determination of the remaining grounds of appeal.

For the foregoing reasons, we quash the appellant's conviction and set aside the sentence of life imprisonment. The offence committed being a serious one; we find this to be a proper case to order a trial *de novo* of the appellant. We accordingly direct that the trial court record be immediately returned to the District Court of Temeke for it to recommence the retrial

expeditiously unless The Director of Public Prosecutions is no longer interested in prosecuting the case.

In the meantime, the appellant shall remain in custody awaiting trial.

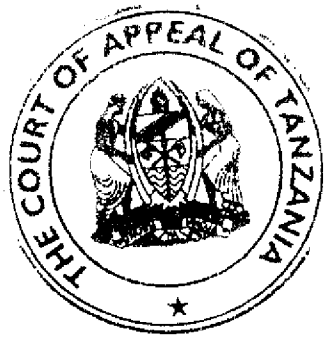
DATED at **DAR ES SALAAM** this 7th day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 16th presence of Appellant in person via video link from Ukonga prison and in absence of Respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL