IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

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

CRIMINAL APPEAL NO. 426 OF 2021

MUSSA ALI RAMADHAN ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal from the Judgment of the High Court of Zanzibar at Vuga)

(Issa, J.)

dated the 1st day of April, 2021
in
Criminal Appeal No. 30 of 2018

JUDGMENT OF THE COURT

7th & 17th June, 2022

LILA. JA.:

This is a second appeal. The appellant, **MUSA ALI RAMADHANI @ MADAFU**, is challenging the High Court's decision which overturned the decision of the Regional Magistrate Court of Zanzibar at Vuga (the trial court). The latter court acquitted him of the offence of indecent assault contrary to section 114 (1) of the Penal Act No. 6 of 2018 of the Laws of Zanzibar. On appeal by the respondent, the High Court quashed the order acquitting the appellant and proceeded to convict and sentence him to serve a correctional term of ten (10) years.

Before the trial court, the appellant was called upon to answer a charge that on 20/06/2018 at around 5:00 pm at Fuoni Mombasa area within West "B" District in West Urban Region of Unguja, he assaulted a young girl aged 8 years by undressing her underpants (chupi), inserting his finger into her vagina and then brushing his penis on her buttocks. We shall refer the girl by the acronym "victim" to disguise her identity.

The prosecution case relied on five witnesses, two of them being children of tender age. One documentary exhibit was also produced; the victim's birth certificate (exhibit P1). The substance of the witnesses' testimonies is that on the material date and time, the victim (PW1), Hafsa and Othman Bakar Othman (PW3) were enjoying their legal right to play when the appellant approached and asked the victim to bring to him a rake. The victim heeded to the request but did so while accompanied with her friends. Together, they collected the rake from the home of Mkongwe Mkubwa Ali (PW4) and took it to the appellant after which they continued playing. No sooner, the appellant, again, asked the victim to give him the rake and the victim did so but the appellant seized the opportunity to take her into a house in which he stayed, undressed her and not only touched her genital parts but also inserted his finger into her vagina while covering her mouth to prevent

her from shouting. The victim felt pains and screamed. The appellant stopped doing that but turned to her back and put his penis in between her buttocks. He then discharged her with a warning not disclose what had transpired to her mother one Rahila Mkubwa Othman (PW1). The victim could not hold it up as she revealed the incident to PW1 who in turn told her husband who mounted a search for the appellant but in vain. PW1 and her husband reported the matter to the Sheha of Mombasa Fuoni and later to Fuoni police station where they were issued with a PF3 and proceeded to Mnazi Mmoja Hospital for a medical examination. The case was investigated by F. 574 DC CPL Shaame (PW5) who claimed that he interrogated the appellant and he confessed to have committed the offence. In proving the victim's age as being 8 years old, he tendered the victim's certificate of birth which was admitted without any objection from the appellant as exhibit P1.

The appellant was the sole defence witness. Apart from admitting knowing the victim, residing near her home at Mombasa Fuoni, he relied on the defence of *alibi* alleging that he was not present when the offence was allegedly committed and dismissed the accusation as being a fabrication and founded on the quarrel he had with the victim's father

who was indebted to him. He also denied confessing to the commission of the offence to PW5.

In his judgment, the learned magistrate found the age of the victim being 8 years old and the appellant staying at the same area with the victim as being undisputed facts. He singled out presence of the appellant at the scene of crime at the material place and time and his involvement in the commission of the offence to be matters calling for his consideration and determination. His defence of *alibi* was, however, found unmerited for his failure to raise it earlier on by way of cross-examination to the prosecution witnesses. On whether the appellant assaulted the victim, the learned trial magistrate found himself faced with irreconcilable evidence by the victim and the appellant. While the former alleged being assaulted, the latter denied the allegation as a consequence he had to resort to the determination of their respective credibility so as to determine it. In so doing he was satisfied that the victim was unreliable for these reasons: **one**, it did not occur to him that the appellant could take the victim into his room and commit such an offence while the other children were still playing just outside the house. **Two**: the victim's evidence was not in harmony with that of PW3 in that while the victim claimed to have been left by PW3 with the handle of the

rake, PW3 claimed that, together with the victim, they went to the appellant's house and then left the place only to be told later that the victim was assaulted. And, **three**, he drew an adverse inference to the prosecution case for the failure to call as a witness one Hafsa, a crucial witness, who could tell whether or not she saw the victim entering into the appellant's house. In conclusion, the prosecution case was found to be highly improbable and in consequence the learned magistrate dismissed the charge and acquitted the appellant.

The trial court's decision aggrieved the appellant and appealed to the High Court. Exercising its mandate as a first appeal court to re-evaluate afresh the trial court evidence, it was satisfied that the respondent was able to prove its case against the appellant beyond reasonable doubt and reversed the verdict. Relying on the Court's decision in the case of **Said Ally vs Republic**, Criminal Appeal No. 249 of 2008 (unreported), it found the contradictions minor which did not go to the root of the case. Further, the evidence by Hafsa was not found to be crucial and its absence had no effect of creating any holes in the prosecution evidence hence found no justification to draw an adverse inference. In supporting that position, the case of **Boniface Kundakira Tarimo vs Republic**, Criminal Appeal No. 350 of 2008 (unreported)

was cited. On the issue of credibility, he took cognizance of the legal position that every witness is entitled to credence and cited the case of **Mawazo Anyandwile Mwaikwaja vs Republic**, Criminal Appeal No. 455 of 2017 (both unreported) as stating that stance. As a result, the appellant was convicted as charged and sentenced as shown above.

A memorandum of appeal raising four (4) grounds of appeal lodged in this Court clearly manifests the appellant's dissatisfaction with the High Court decision. The grounds are crafted in Kiswahili and, as the appeal turns out on only one ground, that is ground 3, we find it unnecessary to recite other grounds. That ground states:-

> The learned judge erred in law and fact for not holding that Voire Dire Test was not properly conducted.

Still thinking that the ground reflected in the memorandum of appeal were not sufficient to convince the Court to overturn the High Court decision, Mr. Rajab Abdalla Rajab, learned advocate who acted for the appellant, sought leave of the Court to argue a ground not raised in the memorandum of appeal in terms of Rule 81(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and, as Mr. Hassan, learned Principal State Attorney, representing the respondent together with Mr. Khamis Othman Abdalla and Mr. Anuar Khamis Saaduni, both Senior State

Attorneys, did not register any objection, we granted him leave to do so. The point was that; when composing the judgment, the learned judge raised a new ground that the learned trial magistrate erroneously dismissed the case under section 220 and determined it without affording an opportunity to the appellant and the respondent to argue on it.

At the hearing of the appeal before us, although Mr. Hassan, initially, contended that the complaint in the additional ground did not form the basis of the learned judge's decision, he later retreated and both learned counsel were agreeable that the course taken by the learned judge was improper and denied the parties the right to be heard which is a fundamental right solidly enshrined in both the Constitution of the United Republic of Tanzania under article 13(6) and section 12(6) of the Constitution of Zanzibar. The learned counsel were also of the same view that although the learned trial magistrate conducted the *voire dire test* on PW2 and PW3 before recording their respective testimonies, he failed to make a finding whether they possessed sufficient intelligence to understand the questions and give rational answers hence rendering their evidence invalid. This, they agreed, subjects such evidence to the wrath of being expunged from the record of appeal hence fatally and

adversely affecting the prosecution case such that it cannot lay a foundation of a valid conviction.

We entirely agree with the learned counsel of the parties that this appeal may neatly and sufficiently be disposed of on the two points of grievances argued by the learned counsel. These are that:-

1. The learned judge arbitrarily raised and determined an issue in the judgment.

2. The evidence by PW2 and PW3 was wrongly received and acted on to base the conviction of the appellant.

We have carefully and dispassionately scanned the respondent's three grounds of appeal before the High Court found at page 40 of the record of appeal and the entire proceedings before it and we were unable to discern from it anything suggesting that either of the parties raised or argued anything touching on the validity of the trial magistrate's order dismissing the case under section 220. Surprisingly, the learned judge not only quoted in extenso the said provision of law but also it was not open as from which law it was, discussed it and ultimately condemned the learned trial magistrate to have erred in dismissing the case under that provision. Pages 60 to 61 of the record bear testimony to that effect.

The infraction being so vivid, we need not be delayed in this ground of appeal. It is common knowledge that the right to a hearing before a decision is made is fundamental and to ensure that right is well safeguarded, it is enshrined in the constitutions of both the United Republic of Tanzania and that of Zanzibar under article 13(6) and section 12(6), respectively. And as an emphasis on its inviolability, in **SHERALLY AND ANOTHER VS ABDUL FAZALBOY,** Civil Application No. 33 of 2002 (unreported), the Court observed that:

> *"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

Thus, consistent with the constitutional right to be heard, we agree with the learned counsel that the learned judge erred and acted in utter violation and breach of natural justice. In the event, as was rightly argued by the learned counsel, the decision of the High Court is a nullity. Such has been the Court's insistence in unbroken chain of

decisions that courts should not decide on the rights of the parties without giving them an opportunity to express their views lest they run a risk of contravening the constitution and the decision would be rendered void and of no effect. [see **Mbeya Rukwa Autoparts and Transport Limited vs Jestina Mwakyoma** [2003] T.L.R 253, **VIP Engineering and Marketting Limited and Others vs Citi Bank Tanzania Limited,** Consolidated Civil References No. 5, 6,7 and 8 of 2008 and **Samson Ng'walida vs The Commissioner General of Tanzania Revenue Authority,** Civil Appeal No. 86 of 2008(both unreported)].

The foregoing finding presents us with a situation that there is nothing upon which the remaining grounds can stand and call for our consideration. But given its significance, we wish to deal, albeit briefly, with the complaint regarding the validity of the evidence by PW2 and PW3.

Certainly, going by the record, it was not at issue before both courts below and before us that PW2 and PW3 were children of tender age whose evidence was receivable either on oath or otherwise upon being tested as to their competence to testify and knowledge of the nature of an oath. In our recent decision in the case of **Issa Amir @ Koshuma vs Republic**, Criminal Appeal No. 120 of 2020 (unreported), relied on by Mr. Rajab, the Court considered the provisions of section

127(1) and (2) of the Evidence Act, Cap. 6 R. E. 2002 before its amendment in the year 2016 by The Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016, Act No. 4 of 2016 which is *pari material* to section 133(1) and (3) of the Evidence Act, Act No. 9 of 2016 of the Laws of Zanzibar. The Court reiterated its stance that *voire dire* test serves three main purposes; **one**, to determine the child's ability to testify that is if he is able to understand questions put to him and give rational answers (competence test), **two**, to determine whether he knows the nature of an oath so that he can give affirmed/sworn evidence (oath test) and **three**, truthfulness, where his commitment to tell the truth and not lies is of essence. The Court underscored the requirement of the learned trial magistrate to record his opinion after conducting *voire dire* test whether the child witness is possessed of sufficient intelligence and understands the duty to speak the truth before his evidence is taken either upon oath or not. The Court made reference to the case of **Hassan Hatibu vs Republic**, Criminal Appeal No. 71 of 2002 (unreported) where it stated 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 the 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 (unreported0;* ***Kisiri Mwita s/o Kisiri v R*** *[1981] TLR 218 and* ***Kibangeny v R*** *[1959] EA 94." (Emphasis added)*

Based on the above extract, the Court insisted that the requisite qualifications of a child witness to testify as being, **one**; that he should possess sufficient intelligence to understand questions and give rational answers, and then he must understand the duty to tell the truth. It is after these conditions are met, then the judge or magistrate may proceed to determine whether he understands the nature of an oath or affirmation so as to determine whether he will testify on oath or affirmation and if he does, then the testimony shall be taken on oath or affirmation. Otherwise, the evidence will be taken without an oath or affirmation. In the instant case, the learned trial magistrate properly

conducted *voire dire* tests to both PW2 and PW3 before receiving their respective testimonies. This is vividly clear at pages 7 to 8 of the record and pages 10 to 11 of the record for PW2 and PW3, respectively. After that he recorded his findings thus: -

Beginning with PW2 at page 7: -

> ***"Court:***
> *The witness understands the nature of oath and has taken oath by saying Wabilahi Wataalahi"*
>
> *And for PW3 at page 8: -*
> ***"Court:***
> *The witness understands the nature of oath, he will then give evidence under oath."*

From these extracts, it is crystal clear that the trial magistrate did not make a finding whether the two prerequisite conditions for a child witness to testify were met before recording their respective testimonies. The finding that they possessed sufficient intelligence to understand questions and give rational answers is omitted. In the case of **Issa Amir @ Koshuma vs Republic** (supra) the Court held that omission to be fatal and declared the evidence invalid which course we see no reason to depart from. For that reason we find ourselves in full

concurrence with the submissions by the learned counsel and we accordingly expunge the evidence by PW2 and PW3 from the record.

With the remaining evidence, can it be held with any degree of certitude that the charge was proved against the appellant beyond reasonable doubt? We do not think so. Neither of the remaining witnesses witnessed the occurrence of the incident. In the absence of the evidence by PW2 and PW3 the prosecution case is seriously weakened. We have, accordingly, found it difficult to believe that the victim was indecently assaulted by the appellant. Had the High Court carried out a judicial evaluation of the evidence in the manner we have done it could have not failed to detect the outlined infractions. It flows well that, with respect, with this outcome of the appeal, we cannot accept the invitation by the learned Principal State Attorney that we should exercise the powers of revision under section 4(2) of the AJA to revise the sentence imposed which he was of the view that it is illegal, so as to impose a proper sentence.

In the event, we are satisfied that the prosecution abysmally failed to prove the charge against the appellant. We, accordingly, allow the appeal, quash the conviction and set aside the sentence imposed on the appellant by the High Court. We sustain the finding of not guilty made

by the trial court but for the reasons explained above. We order the appellant be released from the Correctional Institute forthwith unless he is held therein for any another justifiable cause.

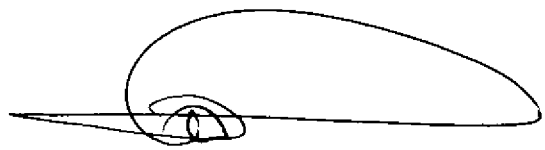
DATED at **ZANZIBAR** this 16th day of June, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of June 2022 in the presence of Ms. Rosemary Nyandwi, holding brief of Mr. Rajab Abdallah Rajab, counsel for the Appellant and Mr. Anwar Khamis Saaduni, learned Senior State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL