IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: KWARIKO, J.A., KEREFU, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 84 OF 2021

RAMSON PETER ONDILE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the Court of Resident Magistrate of Kibaha at Kibaha)

(Mkhoi, SRM Ext. Jur.)

dated the 28th day of December, 2020

in

Extended Jurisdiction Criminal Appeal No. 46 of 2020

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JUDGMENT OF THE COURT

23rd September & 6th October, 2022

KWARIKO, J.A.:

Originally, the appellant, Ramson Peter Ondile, appeared before the District Court of Kibaha at Kibaha (the trial court) charged with one count of incest by male contrary to sections 158 (1) (a) and 159 of the Penal Code [CAP 16 R.E. 2002, now R.E. 2022]. The particulars of the offence were that, on diverse dates within October, 2018 at Kongowe-Ungindoni area within Kibaha District in Coast Region, the appellant had sexual intercourse with his daughter aged eight years whom we shall refer as XYZ to disguise her identity. The appellant did not plead guilty to the charge where upon a full trial, he was convicted and sentenced to thirty years imprisonment.

The appellant was discontented with the trial court's decision hence he appealed to the High Court of Tanzania at Dar es Salaam District Registry. As it happened, in terms of Section 45 (2) of the Magistrates' Courts Act [CAP 11 R.E. 2019], that appeal was transferred to the Court of Resident Magistrate of Kibaha (the first appellate court), to be heard and determined by Mkhoi, Senior Resident Magistrate with Extended Jurisdiction. The appeal was not successful as it was dismissed in its entirety.

Undaunted, the appellant is before the Court on a second appeal. He has raised a total of ten grounds in two sets of memoranda of appeal which raise the following paraphrased nine points of complaint, that; **one,** the charge was defective for being at variance with the evidence in relation to the material date for the commission of the offence; **two,** the evidence of PW2 was received contrary to section 127 (2) of the Evidence Act; **three,** the victim (PW2) did not explain how she identified her assailant; **four,** the unsworn evidence of PW2 was not corroborated by other independent witnesses such as her younger sister; **five**, the first appellate court did not consider the appellant's defence; **six,** the evidence of PW2 was inconsistent with reality and logic; **seven,** the victim unreasonably delayed to report the incident; **eight,** the lower courts did not objectively assess the credibility and reliability of the

evidence of PW2; and **nine,** the prosecution case was not proved beyond reasonable doubt.

At this point, we wish to state the background of the case which led to the appellant's conviction as follows. Following his separation with his wife, the appellant was staying with his children including the victim who testified as PW2. PW2 and her younger sister were schooling at Kongowe Primary School where Atupele Bonaventura (PW1) was a teacher. According to PW1, these children were close to her and she used to assist them whenever they had problems. On 12th October, 2018, while at the school compound, PW2 and her younger sister approached PW1 and had normal greetings. However, as PW1 was leaving, the two kids followed her indicating that there was something that they wanted to tell her, although PW2 hesitated to talk. PW1 allowed the younger sister to go away and that is when PW2 told PW1 that, on several occasions, her father had been raping her. Thereafter, PW1 relayed the news to the Head Teacher one Charles. According to PW1, the victim was one of the pupils who were living miserably with only their father after their mother had left the matrimonial home.

As to what happened to her, PW2 narrated that she was living with her father together with her sisters. That, one day in October, 2018, her father returned home while drunk and had sexual intercourse with her

which caused her to bleed and feel pains. PW2 testified further that although she raised an alarm, she got no any assistance and the appellant repeated the ordeal for more than ten times. She went on to narrate that, finally when she was fed up, she decided to report to PW1 and thereafter was called by other teachers who in turn reported the incident to the police station.

No. WP 4309 Detective Corporal Changu (PW3) testified that, she was assigned to investigate the case on 15th October, 2018 following a report from the Head Teacher of Kongowe Primary School. That, by that time, the appellant was in lock up and already interrogated. According to PW3, she only went through the witnesses' and the victim's statements and forwarded the case file to the higher authority for action.

At the hospital, the victim was attended by Doctor Invionatha Mtitu (PW4) on 12th October, 2018. According to PW4, the victim's vagina had bruises, foul smell, yellow discharge and had no virginity indicating that she was sexually assaulted. PW4's findings were recorded in the PF3 which was received in evidence as exhibit P1 which the first appellate court rightly expunged it from the record as it was not read over after being admitted in evidence.

The appellant was the only witness in his defence. He did not admit the allegations levelled against him. He testified that he quarreled

with his wife in 2014 over mobile phone messages. That, since his wife was illiterate, it was PW1 who used to read those messages to her as they were friends. The appellant testified further that following the said misunderstanding, he separated from his wife and he was left with his children whom he lived with happily since then. He went on to testify that there was also a misunderstanding between him and PW1 arising from her resistance to admit his children to school. That, he reported the matter to the local area leader. He claimed that since PW1 used to give his children some gifts she might have used that opportunity to seduce them to fabricate the present allegations.

At the hearing of the appeal, the appellant appeared in person without legal representation whilst the respondent Republic had the services of Ms. Mkunde Mshanga, learned Principal State Attorney assisted by Mr. Clemence Kato, learned State Attorney. However, before the hearing could commence in earnest, at the instance of the learned State Attorney, the seventh and eighth grounds of appeal were rejected for being new as they were not raised before the first appellate court.

On taking the floor to argue his appeal, the appellant prayed to adopt the grounds of appeal and the corresponding written arguments which he filed on 5th September, 2022 in terms of rule 74 (1) of the Tanzania Court of Appeal Rules. In his submission regarding the first

ground, the appellant argued that while the particulars of the offence alleged that the offence was committed in October, 2018 without mentioning any specific dates, the evidence on record showed that the offence was committed in one day and subsequently ten times in October, 2018. This, according to the appellant, made it difficult for him to properly prepare his defence.

In response, Mr. Kato who argued this ground submitted that there was no any variance between the charge and the evidence. He argued further that the incident occurred in October, 2018 as was conceded by the appellant and the evidence was to the same effect. To support his argument, the learned counsel relied on the Court's earlier decisions in **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 and **Oswald Mokiwa @ Sudi v. Republic,** Criminal Appeal No. 190 of 2014 (both unreported).

Having considered this ground and the evidence on record, we agree with the learned State Attorney that the charge was not at variance with the evidence. This is because, while the particulars of the offence alleged that the incident occurred on divers dates in October, 2018, the evidence on record was to that effect. There is no specific date mentioned either in the charge or in the evidence. However, the decisions in **Damian Ruhele** and **Oswald Mokiwa @ Sudi** (supra)

cited to us by Mr. Kato are distinguishable from the case at hand because in those cases, there was really variance between the charge and evidence but the Court found that the omission was curable. This ground is therefore, devoid of merit and we dismiss it.

The complaint in the second ground relates to the mode the trial court used in taking the evidence of PW2, being a child of tender age. It was the appellant's argument that, the trial court did not adhere to the provisions of section 127 of the Evidence Act. He argued that the provision requires the court to first examine the child to establish whether he understands the meaning and nature of an oath and secondly, if he does not understand the nature and meaning of an oath, then he should promise to the court to tell the truth and not to tell lies. It was the appellant's submission that in its inquiry of PW2, the trial court did not establish whether or not she knew the nature and meaning of an oath before it allowed her to give evidence upon promise to tell the truth and not to tell lies. He argued that, failure to comply with the cited provisions of the law renders the evidence of PW2 valueless deserving to be discarded from the record. To fortify his argument, the appellant placed reliance on our previous decisions in **John Mkorongo James v. Republic,** Criminal Appeal No. 498 of 2020 and **Faraji Said v. Republic,** Criminal Appeal No. 172 of 2018 (both unreported).

On her part, Ms. Mshanga conceded that the trial court omitted to test PW2 on whether she understood the nature and meaning of an oath. However, she argued that the said omission is curable under section 127 (6) of the Evidence Act. In support of her argument, the learned counsel referred us to the Court's decision in **Wambura Kiginga v. Republic,** Criminal Appeal No. 301 of 2018 (unreported).

Our starting point in respect of this ground will be section 198 (1) of the Criminal Procedure Act [CAP 20 R.E. 2022] which requires every witness in a criminal case, subject to the provisions of any other written law, to give evidence upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act. This provision states thus:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

One of the exceptions to this provision relates to witnesses of tender age whose procedure is provided under section 127 (2) of the Evidence Act which states 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 teli iies."

In its interpretation of this provision, the Court has deduced that if the child of tender age understands the nature and meaning of an oath, he should give evidence on oath or affirmation or otherwise, if he does not, he will be required to promise to the court to tell the truth and not to tell lies. Some of the decisions to that effect include: **Salum Nambaluka v. Republic,** Criminal Appeal No. 272 of 2018; **John Mkorongo James v. Republic,** Criminal Appeal No. 498 of 2020; and **Omary Salum @ Mjusi v. Republic,** Criminal Appeal No. 125 of 2020 (all unreported). For instance, in the first case, when interpreting the cited provision, the Court stated thus:

"The provision enjoins trial courts when dealing with children of tender age as witnesses, to still conduct 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 instant case, it is not disputed that the trial court only asked PW2 as to whether she would promise to the court to tell the truth and not to tell lies. It did not satisfy itself first as to whether the child understood the nature and meaning of an oath. While, the learned Principal State Attorney conceded to the omission, she urged us to find that the same is curable under section 127 (6) of the Evidence Act and cited to us the Court's decision of **Wambura Kiginga** (supra). We have thoroughly perused that decision and found that the Court appreciated the conditions obtaining under section 127 (2) of the Evidence Act and admitted that there was an omission when the child witness did not promise to tell the truth and not to tell lies before its evidence was taken. However, the Court decided to apply a principle *that "each case must be decided on its own facts and the core function of the court is to ensure that justice is done by whatever means."*

Therefore, since in that decision, we did not exclude the provisions of section 127 (2) of the Evidence Act, we still find that the trial court in the instant case erred to receive the evidence of PW2 in violation of that provision of the law. We are supported in this view by our recent decision in **Emmanuel Masanja v. Republic,** Criminal Appeal No. 394 of 2020 (unreported) where it was stated thus:

> *"In **Wambura Kiginga** (supra), we did not construe subsection (6) of section 127 as to exclude the precondition under subsection (2). Instead, guided by the principle that "each case must be decided largely on its own facts" and that "the core function of courts is to ensure that justice is done by whatever means", we gave the provision a broader conceptualization to mean that; where the only independent evidence is that of a child of tender age, it may be used to sustain conviction notwithstanding the provision of subsection (2)."*

Further, in that case, we considered our earlier interpretation in the case of **Nguza Vikings @ Babu Seya & 4 Others v. Republic,** Criminal Appeal No. 25 of 2005 (unreported) where we observed as follows:

> *"In **Nguza's case** therefore, the provision was construed so as to avoid conflict between subsection (7) now subsection (6) and subsection (2) of section 127. We shall base our decision on this authority. We are guided by the rule of statutory interpretation that, a statute should be construed as one document."*

Being guided by the above authorities, we find the evidence of PW2 taken contrary to the requirement of the law and we hereby

discard it from the record. The second ground of appeal is therefore meritorious.

Having discarded the evidence of PW2, the question which follows now is whether the remaining evidence on record is capable of sustaining the appellant's conviction. Starting with PW1, her evidence is hearsay, having been informed by the victim that the appellant had sexually assaulted her. It is trite law that, hearsay evidence is incapable of grounding a conviction. As for PW3, what she did is to peruse the case file by reading witnesses' and victim's statements and forwarded it to the higher authority for action. According to her, the appellant had already been interrogated. However, she did not even say what the appellant said upon arrest for these allegations. Lastly, the doctor (PW4) only established that the victim was sexually assaulted but did not prove who the perpetrator was.

Another thing which has troubled our mind is the delay to arraign the appellant in court for the said offence. The evidence on record shows that the incident occurred in October, 2018 and the information was reported to PW1 on the same month. However, the appellant was arraigned before the trial court on 14th August, 2019, that is about ten months later.

Upon our inquiry about the delay, Ms. Mshanga, learned Principal State Attorney contended that it was due to ongoing investigation although she conceded that there is no evidence from the investigating officers to that effect. There was actually no explanation why there was such a delay. In fact, there is no evidence to show when and how the appellant was arrested and what he said after arrest. What PW3 said is that, when the case file was assigned to her, the appellant was in lock up and had already been interrogated. Furthermore, the Head Teacher at PW2's school one Charles to whom PW1 allegedly reported the incident and himself reported the matter to police was not summoned to testify on how things unfolded.

We are querying this matter, because from the beginning, the appellant complained that PW1 was a friend of his estranged wife and was close to his children hence anything against him could have been framed. PW1 also admitted that she was very close to PW2 and his younger sister. Unfortunately, this line of defence by the appellant was not even considered by the two courts below and it is the complaint in the appellant's fifth ground of appeal. It is therefore our considered view that the unexplained delay to arraign the appellant in court creates doubt in the prosecution case as to whether the incident occurred as alleged.

For what we have discussed herein above, we do not find any pressing need to determine the remaining grounds of appeal. It is therefore, clear that the prosecution did not prove their case beyond reasonable doubt against the appellant.

Conclusively, we find the appeal meritorious and we hereby allow it, quash the conviction and set aside the sentence meted out against the appellant. We thus order for the release of the appellant from custody unless he is otherwise lawfully held.

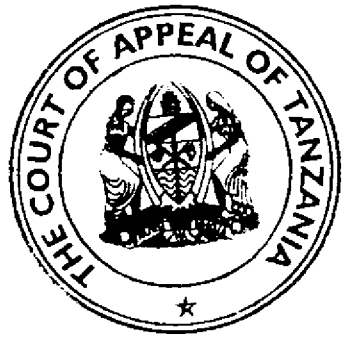
DATED at **DAR ES SALAAM** this 5th day of October, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 6th day of October, 2022 in the presence of the appellant in person linked-Via Video from Ukonga Prison and Mkunde Mshanga, learned Principal State Attorney linked-Via Video from Kibaha for the respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL