IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., FIKIRINI, J.A. And MURUKE, J.A.)

CRIMINAL APPEAL NO. 382 OF 2019

GEORGE LUCAS MARWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Ismail, J.)

dated 15th day of July, 2019

in

Criminal Appeal No. 36 of 2019

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JUDGMENT OF THE COURT

10th & 19th July, 2023

MURUKE, J.A.:

The appellant, George Lucas Marwa, was charged in the District Court of Musoma at Musoma, with an unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [CAP 16 RE. 2002]. He was convicted and sentenced to life imprisonment together with an order of payment of TZS 3,000,000.00 to the victim, as compensation for injuries, humiliation and psychological torture that were perpetrated to the victim.

It was alleged that between July and December, 2016, at Nyakato Mlimani area, Musoma District, the appellant had carnal knowledge of a boy of 9 years or SM against the order of nature.

What led to the arraignment and conviction of the appellant is hereby summarized as follows: - The appellant and the victim were neighbours who knew each other well. Before the incident, the appellant used to assist the victim's mother to crash stones on payments. On diverse dates between July and December, 2016, the appellant indulged in unnatural sex with the victim after threatening the latter. It was alleged that, on the first day, the victim, then nine-year old boy, was coming from the lake shore, where he was sent by his mother to buy fish. On his way, he met the appellant, who forced him to go with him up the hill, at a place known as Nyakato Mlimani. Armed with a panga, the appellant forced the victim to undress and he sodomized him. He did it on the second day, when the victim was playing football. The appellant warned the victim not to disclose the ordeals to anyone or else he will kill all his family members. Used and addicted to the habit, the victim was sometimes looking for the appellant who had labelled the victim to be his wife.

One day, he asked his class mates to do to him what the appellant was doing to him. This alarmed the students who reported the matter to their teacher. On being interviewed, the victim disclosed what the appellant had been doing to him to the extent of being addicted. The teacher Ivela Sosthenes (PW2) shared the sad story to the victim's mother, Rhobi Nyamakwesa (PW3) who reported the incident to the police. The appellant was arrested and arraigned in court on 21st March, 2016.

The prosecution evidence relied on to convict the appellant came from four (4) witnesses as follows: PW1 was the victim who narrated the episode that he encountered with the appellant to the extent of being addicted. Iveta Sostenes, a teacher at Mshikamano Primary School where PW1 was schooling, said she received complaints of PW1's behaviour from his fellow students and interviewed PW1. She then reported the incident to PW3, who then reported the matter to the police resulting in the appellant's arrest. Sabato Makuke, medically examined the victim, upon being given PF3 by the police, and confirmed to find bruises in the victim's anus caused by friction by the use of blunt object.

In his defence, the appellant vehemently denied to have committed the crime, alleging misunderstanding with the victim's mother on payments of his dues for stone crashing business owned by the victim's mother. The appellant called DW2 Lucas Magori, as his witness who blamed the victim's mother for framing a case against the appellant.

Persuaded by the oral account of the victim, as substantiated by that of PW2, (the teacher), PW3 the mother of victim, together with expert evidence of PW4, the Doctor, the trial court convicted the appellant with the offence and sentenced him as explained above. Notwithstanding his appeal to the first appellate court, neither the conviction nor the sentence was disturbed. The appellant still believes he is innocent, this is why he has preferred this appeal, seeking to challenge the decision of the High Court on the grounds that: -

1. *That, the 1st appellate court erred in law to uphold the conviction and sentence of the trial court while the prosecution failed to prove their case beyond reasonable doubt and 1st appellate court failed to consider the doubt and confirmed the conviction and the sentence.*

2. *That, trial court erred in law to convict and sentence the appellant basing on contradictory, inconsistent, unreliable, incredible evidence of the prosecution which failed to prove the charge beyond reasonable doubt.*
3. *That, the 1st appellate court erred in law to uphold the conviction and sentence of the trial court while the preliminary hearing was not properly conducted and the irregularities vitiated the entire proceedings of the trial court.*
4. *That, the 1st appellate court erred in law to uphold conviction and sentence of the trial court while the proceedings of the trial court were tainted with illegality that vitiated the entire proceedings, and judgment of the trial court.*

At the hearing of the appeal, Mr. Daudi John Mahemba, learned advocate represented the appellant who was also present, and the respondent (Republic) was represented by Ms. Gisela Alex Bantulaki, learned State Attorney.

Before commencement of the hearing of the grounds of appeal on merits, the Court drew the attention of the learned State Attorney and Mr. Mahemba on the victim's evidence aged nine years by the time he gave evidence at page 10 of record, being received without

oath or affirmation or in terms of section 127 (2) of the Evidence Act, Cap 6 RE. 2019.

The appellant's counsel Mr. Mahemba argued that reception of PW1's evidence contravened section 127 (2) of the Evidence Act. The remedy is to expunge his evidence. Once PW1 evidence is expunged, the evidence by PW2 and PW3 who were just told by PW1 remains a hearsay, while PW4's evidence is an expert opinion.

The learned State Attorney Ms. Bantulaki submitted that, it is true that at page 10 of the records, PW1 evidence was taken in contravention of section 127 (2) of the Evidence Act. PW1 ought to have taken oath but did not or promised to tell the truth and not lies. Thus, evidence of PW1 does not meet the requirement of section 127 (2) although that can be cured by section 127 (6) of the same. More seriously is that evidence of PW2, PW3 and PW4 alone without PW1 cannot ground conviction as both were told by PW1 who was the victim.

On being engaged by the Court on the way forward, the appellant's counsel outrightly urged for the proceedings and conviction to be quashed, sentence be set aside and appellant be set at liberty. Contrary to opinion of the appellant's counsel, the learned State

Attorney submitted that the remedy is to quash the proceedings and conviction, set aside sentence, then order re-trial before another magistrate because, evidence is straight, and prosecution cannot fill gaps as there is none, citing the famous case of **Fatehali Manji v. Republic** [1966] 1EA at page 343, in which the defunct East African Court of Appeal among other things held that: -

> "*In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial; even where a conviction is vitiated by mistake of the trail court for which the prosecution is net to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should be made where the interests of justice require it".*

To appreciate the issue of none compliance of section 127 (2) of the Evidence Act, it is worth demonstrating how the evidence of the

victim was recorded on 28th September, 2017 as seen at page 10 of the record:-

> "***PW1: Stephano s/o Wambura, male, 9 years Ngurimi, Christian is hereby states as follows***".

The victim being a Christian, there is **no oath** that was taken, **no promise or commitment** from him to **tell** the truth as required under Section 127 (2) of the Evidence Act, which provides that: -

> *"(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".*

The interpretation of the above section has been a subject of discussion by the Court in numerous decisions. In the case of **Issa Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (unreported), it was held that, the said provisions permits a child of tender age, that is, a child whose apparent age is not more than fourteen years, to give evidence **on oath or affirmation** or **to testify** without oath or affirmation, but upon promising to **tell** the truth, not **lies**.

It is our conviction that where a witness is a child of tender age, a trial court should at the beginning ask a few pertinent questions, so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative, then he or she can proceed to give evidence on oath or affirmation, depending on the religion professed by such child witness. If such child does not understand the nature of oath, he should, before giving evidence, be required to promise to tell the **truth** and not to tell **lies.** The procedure explained should be reflected on the proceedings of the trial court.

According to the records, the victim who was presented to be nine years old at the time he testified, was a child of tender years therefore, reception of his evidence was to comply with section 127 (2) of the Evidence Act. As reproduced above, before receiving the evidence of the victim at page 10 of records, the trial magistrate did not ask him any preliminary questions to determine if the witness understood the nature of an oath for him to qualify to give evidence on oath, or promised to tell the **truth** and not **lies**.

None compliance of the two conditions above, renders the evidence of the child useless, liable to be expunged from the records.

We fully subscribe to the decision of this Court in the case of **Yusuph Milo v. Republic**, Criminal Appeal No. 343 of 2017 (unreported) where it was insisted that:-

> *"What is paramount in the new amendment is for the child before giving evidence to promise to tell the truth to the court and not lies. That is what is required. It is mandatory that such a promise be reflected in the record of the trial. If such a promise is not reflected in the record it is big below in the prosecution case. What is fundamental in the evidence of a child below 14 years is to promise to tell the truth and not lies. Such promise must be real (actual) and it has to be reflected in the proceedings. Principal was insisted by the Court in the case of* ***Godfrey Wilson v. Republic****, Criminal Appeal No. 168 of 2018,* ***John Makongoro v. Republic****, Criminal Appeal No. 498 of 2020,* ***Nestory Simchimba v. Republic****, Criminal Appeal No. 454 of 2017,* ***Hamisi Issa v. Republic****, Criminal Appeal No. 274 of 2018,* ***Seleman Moses Sotel @ White v. Republic****, Criminal Appeal No. 385 of 2018 and* ***Mwalim Jumanne v. Republic,*** *Criminal Appeal No. 181 of 2019 (all unreported)".*

The learned State Attorney urged the Court to consider the evidence of the victim under section 127 (6) of the Evidence Act notwithstanding none compliance of section 127 (2) of the Evidence Act. It is worth noting that, Act No. 4 of 2016 is the one that introduced section 127 (2) of the Evidence Act, to the effect that, a child of tender years can testify without oath or affirmation upon promising to tell the **truth** and not **lies**. It is clear that, conditions for admissibility of the evidence of a child of tender years in terms of subsection 2 of section 127 of the Evidence Act have not been overridden by the provisions of subsection 6 of the same Act. Thus, to our mind section 127 (6) previously section 127 (7) of the evidence Act, is there to complement section 127 (2) of the same Act. This was the holding in the famous case of **Nguza Vikings @ Babu Seya & 4 others v. Republic**, Criminal Appeal No. 56 of 2005 (unreported), that held that:-

> *"But at this juncture, we entirely agree with Mr. Marando that the provisions of section 127 (7) do not override the provisions of section 127 (2). All that sections does is to allow the court, in sexual offences, to assess the credibility of a child witness who is the only independent witness or a victim of a crime,*

and convict without corroboration, if the court is satisfied that the child witness told nothing but the truth".

The above position was stated also in the case of **Omary Kisuu v. Republic**, Criminal Appeal No. 39 of 2005 (unreported) where Court stated that:-

> *"It is true, in the past, courts used to hold that, while it was not a rule of law that an accused person charged with rape could not be convicted on uncorroborated evidence of prosecutrix especially if of tender years, yet as a matter of practice courts used to look for and required corroboration in sexual offence as stated by the appellant relying on the case of* ***Andrea Maginga*** *cited above. But those days when the position used to be so are long ago. They were swept away by the enactment of the Sexual Offences Special Provisions Act 1998 which amendment allowed conviction of rape even on uncorroborated evidence of a child of tender years as a single witness where the court is satisfied that she is telling nothing but truth, as in this case.*

Thus, in view of the discussion above, the evidence of PW1 was received in contravention of section 127 (2) of the Evidence Act, thus liable to be expunged as we hereby do. A boy of nine years, being sodomized to the extent of being addicted is an inhuman act. It is an offence against morality, thus a serious one.

Having shown above that the offence is serious against a child of tender years we thus order the case be heard afresh. We are convinced retrial will not avail an opportunity for the prosecution to fill gaps that they left on the first trial as was correctly submitted by learned State Attorney and held by the Court in the case of **Peter Charles Makupila @ Askofu v. Republic**, Criminal Appeal No. 21 of 2019, that:-

> *"In both cases the bottom line is whether an order of retrial will be just in the circumstances of each particular case. And, that such an order should not afford the prosecution opportunity to introduce other evidence (new evidence) not presented at the first trial so as salvage their otherwise weak case in order to secure a conviction."*

We accordingly, nullify the entire proceedings of the trial court, quash the appellant's conviction and set aside the sentence

imposed. The High Court proceedings and judgment are also quashed. We further order that the appellant should be retried expeditiously before another magistrate. Since the appellant is in prison custody, we order that he now be remanded in a remand custody.

We so order.

DATED at **MWANZA** this 18th day of July, 2023.

S. A. LILA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 19th day of July, 2023 in the presence of the appellant in person and Ms. Monica Mwery, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL