IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., KEREFU, J.A And MDEMU, J.A.)

CRIMINAL APPEAL NO. 15 OF 2021

ATHUMAN ADAM KAPAYA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mzuna, J.)

dated the 31st day of May, 2021

in

Criminal Appeal No. 102 of 2019

.....

JUDGMENT OF THE COURT

25th September &3rd October, 2023

MDEMU, J.A.:

In this second appeal, the appellant herein is challenging the judgement of the High Court of Tanzania at Arusha in Criminal Appeal No.102 of 2019. In that decision, the High Court affirmed the decision of the Resident Magistrate's Court of Arusha (the trial Court) which tried, convicted and subsequently sentenced the appellant to serve life imprisonment for unnatural offence contrary to the provisions of section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2002, now R.E. 2022. According to the particulars of offence in the charge, it was alleged that, on or about and between the 3rd and 4th March, 2018 at

Maji ya Chai Village within Arumeru District, the appellant had carnal knowledge of one "AML" (disguised for identity purposes), a boy of seven (7) years old against the order of nature.

The background of this appeal as appraised from the prosecution case during trial are that; "AML" (the victim) a class two pupil at St. Francis Dicent Pre-Primary School, while in sports with other children near the appellant's residence, were called by the appellant to watch movie in his residence. They responded. According to the victim who testified as PW1, in the course of watching movie, the appellant asked other children to get outside leaving him with the appellant. PW1 continued to explain that, the appellant then gave him TZS 700/= to buy anything of his choice. In his further evidence, PW1 stated that, seizing advantage of that privacy, the appellant undressed his trousers and underwear and then inserted his manhood into his anus. PW1 explained also that act in the following words: "akanilalia, aliingiza chululu yake kwenye sehemu yangu ya kunyea" literally meaning that "he slept on me, he inserted his penis into my anus". Having fulfilled his sexual gratification, according to PW1, the appellant then allowed those children he earlier on released to join PW1 to continue watching movie.

On realizing that "AML" could not return home early as he usually does, PW3 one Namnyaki Palmet Loomo, (the victim's grandmother)

then made a follow up thus met him at the appellant's residence but did not report the incident that same day. Later, PW2 who used to take care of "AML", heard from other kids that the appellant had sodomised "AML". She then informed PW3 who, upon interrogation, "AML" confirmed to have been carnally known by the appellant against the order of nature. The incident was then reported to Usa-River Police Station and thereafter the victim was taken to Meru hospital where, according to PW5, the victim was attended by Dr. Ayo. The PF3 (exhibit P1) is to the effect that, the victim had bruises in his anus suggestive of being penetrated by a blunt object. In his defence, the appellant conceded presence of "AML" and other children at his premises watching movie but denied to have had carnal knowledge of "AML" against the order of nature.

Notwithstanding the appellant's total resistance in the incident, the trial court trusted the prosecution case thus, as said, convicted and sentenced the appellant to serve life imprisonment. This was on 30th September, 2019. His appeal to the High Court was without success hence the instant appeal on the following 8 grounds of appeal:

1. *That, Courts below erred in law and fact when it convicted and sentenced the appellant in contravention of section 127 (2) of the TEA.*

2. *That, the trial Magistrate erred in both law and in fact by not complying with the provision of section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002.*
3. *That, the lower Courts erred in both law and in fact by relying on the contradiction evidence of the prosecution.*
4. *That, the Courts below erred in law and in fact by convicting and sentencing the appellant without the prosecution side calling the material witness who are ISSAYA, PENDAEL and KHERI.*
5. *That, the Courts erred in law and in fact by convicting and sentencing the appellant by relying on PW2 (FEDELINA PAUL MASSAWE) evidence while there was contravention of section 198 (1) of C.P.A. that she was not take oath before giving her evidence.*
6. *That, the accused was not given a fair trial during the hearing of the case since he was never asked whether he was ready before the same could commence.*
7. *That, the Courts below erred in law and fact by holding that, the prosecution case was proved beyond reasonable doubt.*
8. *That, the lower Courts erred in law and in fact by convicting and sentencing the appellant*

while the appellant's defence case was totally not considered.

The appeal was before us for hearing on 25th September, 2023 in which Ms. Janeth Sekule assisted by Ms. Upendo Shemkole, both learned Senior State Attorneys appeared for the respondent Republic whereas the appellant appeared in person, unrepresented.

The appellant commenced his submission by adopting the grounds of appeal appearing in the memorandum of appeal to comprise part of his oral submission. In elaborating the 1st ground of appeal, while making reference at pages 11 and 12 of the record of appeal, the appellant submitted that, the evidence of PW1 was taken in contravention of the provisions of section 127(2) of the Evidence Act, Cap. 6 because the trial court conducted *voire dire test* instead of allowing the witness to promise to tell the truth and not to tell lies. He thus urged us to expunge the said evidence banking on the case of **John Mkorongo James v. Republic**, Criminal Appeal No.498 of 2020 (unreported).

Elaborating the 2nd ground of appeal, the appellant's contention hinged on the evidence of PW5 who filled the PF3 and testified in court while Dr. Ayo who examined the victim neither filled the PF3 nor appeared in the trial court to testify. This to him was in violation of

section 240 of the Criminal Procedure Act, Cap. 20, R.E. 2022 (The CPA) more so as there was no proof that the said Dr. Ayo was at Muhimbili National Hospital for treatment. He cited to us the case of **Hemed Saidi v. Mohamed Mbilu** [1984] T.L.R. 113 to bolster his assertion.

Arguing grounds 3 and 7 of the appeal together, the appellant submitted that, the prosecution case was not proved to the required standard due to contradictions amongst the prosecution witnesses. He mentioned such contradictions basing on the evidence of PW1 and PW2, that it is not known who actually took PW1 to hospital because, whereas PW1 named Mama Clara, PW2 stated to be with PW3 when reported the incident at the police station for a PF3. He also commented that, PW1 never disclosed the incident date unlike PW2 who testified to the effect that, the offence was committed on 7th March, 2018. The appellant added further that, none of the prosecution witnesses proved the date appearing in the charge to be the incident date. He thus argued, under the circumstances, the prosecution should have amended the charge, failure of which, the charge remains unproved. He referred us to the case of **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No.327 of 2016 (unreported) in support of that averment. He also made reference to the case of **John Mkinze v. Republic** [1992] T.L.R. 22 insisting

that, existence of contradiction in the prosecution case is evident that the charged offence was not proved.

Submitting in ground 4, the appellant's concern was that, the prosecution failed to call in evidence those children mentioned by PW1 at page 12 of the record of appeal. To him, such children were important witnesses and failure to summon them connotes that, the prosecution had hidden important facts. He thus asked us to draw adverse inference in the prosecution case as was in the case of **Hemed Saidi v. Mohamed Mbilu** (supra).

As to ground 5, the appellant challenged unsworn evidence of PW2 for contravening section 198 (1) of the CPA thus invited us to expunge it guided by the principles stated in **Juma Hamad v. Republic**, Criminal Appeal No.141 of 2014 (unreported).

In reply, Ms. Sekule resisted the appeal. Replying on ground 1, she conceded on noncompliance with the requirement of section 127 (2) of Cap. 6 but averred to be unfatal for the said evidence is of probative value under section 127 (6) of Cap. 6. She implored us to hold so relying on our previous decision in the case of **Wambura Kiginga v. Republic**, Criminal Appeal No. 301 of 2018 (unreported).

As to ground 2, the learned Senior State Attorney could not have difficulties in the testimony of PW5 because, much as the appellant did not examine PW1, the PF3 (P1) was filled basing on the information available at the hospital left by Dr. Ayo. She however submitted to us that, the said PF3 be expunged on account that it was not read in court at trial on admission as an exhibit. In this one, she cited to us the case of **Samson Matiga v. Republic**, Criminal Appeal No.205 of 2007 (unreported).

In ground 3 regarding contradiction, Ms. Sekule observed none because, according to PW1, Mama Clara is the one who took the victim to hospital. The fact that PW3 and PW1 passed first to a police station is not contradiction because it may not be interpreted to mean that Mama Clara never took PW1 to hospital. That notwithstanding, it was the submission of the learned Senior State Attorney that, if any contradiction exists as submitted by the appellant, then the same has not gone to the root of the matter to make none occurrence of the incident. She based her argument on the principles stated in **Lengume Lenamas Lesei v. Republic**, Criminal Appeal No.420 of 2020 (unreported) thus urged us to hold so.

Ms. Sekule continued to submit in ground 4 of the appeal that, witnesses summoned by the prosecution were the only material

witnesses required to prove the prosecution case. According to her, children named by PW1 for that matter, were not material witnesses because, as testified by PW1, they were outside of the crime scene when the appellant was sodomizing the victim. She added further that, the appellant himself has not denied presence of PW1 in his premises, thus the need to have in evidence those named by PW1 will not add any value to the prosecution case.

Replying to ground 5, Ms. Sekule conceded that, PW2 took unsworn evidence thus urged us to expunge it. She continued to reply in ground 6 that, as found at page 10 of the record of appeal, the appellant was fairly treated to the extent of being given right to engage an advocate to defend him. In fact, he was allowed and his advocate participated in examination of witnesses, Ms. Sekule insisted. She thus urged us to find this ground to have no substance.

Submitting in grounds 7 and 8 as one, the learned Senior State Attorney submitted that, at page 56 of the record of appeal, the appellant's defence was dully considered and that, as she submitted in other grounds of appeal, the ingredients of the offence under section 154 of the Penal Code, penetration inclusive, has been proved to exist. She therefore concluded that, the evidence of PW1 as corroborated by that of PW3 established the offence as per the charge. She therefore

submitted finally that, there is no merit in the appeal thus urged us to dismiss it.

Having examined the record of appeal and dully considered submission of the appellant and the leaned Senior State Attorney, one issue calling for our determination is whether the appellant herein did have carnal knowledge of PW1, a child of tender age, against the order of nature. We have broadly framed that issue because it is not disputed that the victim and other children were in the residence of the appellant watching movie. It is equally on record that, at a certain hour in the incident date, PW3 went to the appellant's premises and took hold of the victim to their residence. In this, we are not told if PW3 met PW1 watching movie alone or was with other children named by PW1 and the appellant. But the least we can say is this, that PW1 was in the residence of the appellant, with whom? that is a matter of evidence.

We have now to resolve the complaints of the appellant in the first ground of appeal. The main concern is on violation of the provisions of section 127 (2) of the Evidence Act. In the said enactment, a child of tender age, PW1 in this case, may testify in court without oath or affirmation provided that a promise to tell the truth and not to tell lies is offered by the said child prior to reception of that evidence. This is the law now regulating the procedure to be followed by courts in taking

evidence of children of tender age. Was the procedure followed? Both the appellant and the learned Senior State Attorney are in consensus that, PW1 did not promise to tell the truth and not lies before his evidence was received by the trial court. At pages 11 and 12 of the record of appeal, which we had time to analyse, is recorded that:

> ***"VOIRE DIRE TEST***
>
> *SWORN EVIDENCE*
>
> ***QN:*** *which religion are you*
>
> ***ANS:*** *I am Christian*
>
> ***QN****: what have you been taught at church?*
>
> ***ANS:*** *To love God.*
>
> ***Qn:*** *Have you ever tell lies*
>
> ***Ans****. No.*
>
> ***Qn:*** *Do you know the meaning of an oath.*
>
> ***Ans****: No.*
>
> ***UNSWORN EVIDENCE***
>
> ***Qn****: How old are you.*
>
> ***Ans:*** *I am seven (7) years old.*
>
> ***Qn****: where are you schooling*
>
> ***Ans:*** *St. Francis English Medium*
>
> ***Qn:*** *Have you been gone to church*
>
> ***Ans****: Yes*
>
> ***Qn****: What have you been taught at church?*
>
> ***Ans:*** *we shouldn't steal, we shouldn't tell lies*

***Qn**: What are the consequences of telling lies.*

***Ans**: You will be taken at the hell to Satan*

***Qn**: Who is your class teacher.*

***Ans**: Teacher Nisah*

***Court:** The child possesses sufficient intelligence to testify and understand the duty of speaking truth."*

As per the foregoing reproduced passage, it is obvious that the learned trial Magistrate embarked on the old procedure of conducting *voire dire test.* It is conspicuous in the record such that the first appellate court ought to have noted it. According to the record, this offence was committed in the year 2018. The amendment which legislated the requirement of promising to tell the truth and not tale lies was introduced in 2016 through the Written Laws (Miscellaneous Amendment) Act No. 4 of 2016. As we observed in **Godfrey Wilson v. Republic**, Criminal Appeal No.168 of 2018 (unreported), the trial Magistrate ought to have required PW1 to promise whether he will tell the truth and not tell lies. This was not done by the trial court.

What then is the remedy? Parties parted their ways. The appellant asked us to expunge the evidence of PW1, the position which the learned Senior State Attorney resisted and implored us to be guided by our decision in **Wambura Kiginga v. The Republic** (supra) particularly at page 15. We will come to this later. Admittedly, this Court,

in numerous occasions had pronounced itself on the effects of noncompliance with the provisions of section 127 (2) of the Evidence Act. The remedy, as submitted by the appellant when expounding his ground of appeal is to expunge the wrongly received evidence. In **John Mkorongo James v. Republic** (supra) cited to us by the appellant at page 15 of the judgment, this Court ruled out that:

> *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 is accordingly expunged from the record. In the event, we find the first ground of appeal to be meritorious and we accordingly sustain it.*

This for sure is the settled position. But as demonstrated above, Ms. Sekule asked us to refrain from so doing because, in one of our decisions, that is, **Wambura Kiginga v. The Republic** (supra), at page 15, the Court held that:

> *"We must confess at the outset that we construed the opening phrase,* ***"Notwithstanding the preceding provisions of this section****", to mean that, a conviction can be based on only subsection (6) of section 127*

without complying with any other sub section of 127 including sub section (2)."

Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The conditions are; ***first,*** *that there must be clear assessment of the victim's credibility on record and;* ***second,*** *the court must record reasons that notwithstanding non-compliance with section 127(2), a person of tender age still told the truth.*

We have taken concern of that decision which was delivered on 13th March, 2022. Few months later, that is on July 15th, 2022, in the case of **Emmanuel Masanja v. Republic**, Criminal Appeal No.394 of 2020 (unreported) at page 8, the Court observed that:

"In ***Wambura Kiginga v. R,*** *(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).

Having observed so, in the instant case, we demonstrated above that the evidence of PW1 was taken without having first promised to tell the truth and not to tell lies. The invitation by the learned Senior State Attorney to us to go by our decision in **Wambura Kiginga's case** (supra) under the circumstances of this case, may not be accommodated. What the Court stated in **Emmanuel Massanja v. Republic** (supra) which is a recent decision, is good law because application of subsection (6) of section 127 cannot be taken in exclusion of the conditions stated in subsection (2) of the same section. In other words, for subsection (6) of section 127 to come into play, the evidence of child of tender age must have first been received in accordance with the laid down procedure, in this case, the promise to tell the truth and not to tell lies. As said, there must be evidence taken in accordance with the laid down procedure, cleared from procedural requirement first for one to invoke the substance in subsection (6). In all therefore, we decline to accommodate the position of the learned Senior State Attorney. We thus proceed to discount the evidence of PW1 from the record, as we hereby do.

Having discounted the evidence of PW1, the next question is whether there is other remaining evidence on the record through which we can deploy to sustain conviction of the appellant. We have in mind that, depending on the circumstances of each case, offences of this nature, say against a child of tender age, may be proved without the evidence of a victim. As scanned from the record, PW1 in this case was the only eye witness. The evidence of PW2, as submitted by the learned Senior State Attorney and the appellant, which we also associated ourselves, was in contravention of section 198(1) of the CPA, that is, it was taken down without oath or affirmation. We accordingly expunge it from the record. However, even if that was sworn evidence, it would remain to be hearsay having expunged the evidence of PW1, so is the evidence of PW2 which also suffers the same consequence, that is, it remains a hearsay and therefore of no value in absence of the evidence of PW1. Again, as urged by the learned Senior State Attorney, the evidence of PW5 is expunged because Dr. Ayo who examined the victim neither filled the PF3 nor tendered the said exhibit in court, leave alone the consequences the said PF3 suffers for not being read out in court after having been cleared for admission.

The conclusion we therefore make is that, having expunged the evidence of PW1, there is no other evidence on record with which to

base in sustaining conviction and the resultant sentence. We thus allow the appeal by quashing the conviction and set aside the sentence of life imprisonment meted out to the appellant. We accordingly order his release, else held for some other lawful causes.

DATED at **ARUSHA** this 3rd day of October, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The judgment delivered this 3rd day of October, 2023 in the presence of the appellant in person and Ms. Upendo Shemkoe, 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