IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWARIJA, J.A., KENTE, J.A., And MGONYA, J.A.)

CRIMINAL APPEAL NO. 446 OF 2020

JOSEPHAT MGOMBA @ ABROSE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(Mutungi, J.)

dated the 10th day of August, 2020

in

DC. Criminal Appeal No. 32 of 2020

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JUDGMENT OF THE COURT

19th & 22nd March, 2024

KENTE, J.A.:

The appellant, Josephat Mgomba alias Abrose, was convicted by the District Court of Moshi of the offence of grave sexual abuse contrary to section 138C (1)(a) and (2) of the Penal Code, Chapter 16 of the Revised Laws. He was subsequently sentenced to twenty years imprisonment. His appeal to the High Court (sitting at Moshi), was unsuccessful hence the present appeal.

The prosecution evidence which came from the testimonies of five witnesses was briefly to the following effect: that, on 29th April 2019, the complainant a child aged four years whose name we shall hereinafter in this

judgment, conceal and simply refer to her interchangeably as either, the victim or PW2, was on the material day, left under the care of PW3 when her mother, PW1, went to attend a clinic. While PW3 was still with the complainant, the appellant allegedly went there and asked for PW3 to allow her to accompany him to a nearby shop with the intention of buying her some biscuits. It was then about 11.00am.

After the appellant had purchased the said biscuits and given them to PW2 and, while on their way back, they passed through a narrow path where the appellant allegedly told the complainant to split open her legs and he allegedly went on to insert his finger into her private parts. The victim complained that, she was feeling pains whereupon, the appellant released her and told her to go back to PW3. On being released, PW2 returned to PW3 and continued playing with other children.

According to PW1, upon arrival from the clinic, she was told by PW2 what the appellant had done to her. PW1 hurriedly went to report the matter to the ten-cell leader and the appellant was thereafter pursued and arrested. PW2 was taken to Mawenzi Hospital, and examined by PW4, a Clinical Officer. According to PW4, the examination revealed that the complainant had no hymen, there were blood stains on her private parts and the victim was feeling severe pains. Moreover, the witness told the trial court that she had been affected psychologically.

In sum, PW4 opined that, PW2's vagina was penetrated by a blunt object. During the trial, PW4 tendered a Medical examination report which was admitted in evidence as Exhibit P1.

Back to the police station, the appellant was interrogated by No. F5955 Corporal Oscar a Police Officer, who told the trial court that, the appellant had admitted to have gone with the victim to the shop and bought her some confectionery. However, on further interrogation, the appellant denied to have abused the complainant. That in essence, was the prosecution evidence against the appellant.

On his part, the appellant's defence was that, indeed on the material day, he went to the shop and bought biscuits for PW2 and then went back with PW2. Denying the charges, he said, he could not have inserted his fingers into the victim's private parts as that would not be possible if, as it was testified by her, she had her clothes on.

At the conclusion of the trial, the appellant was found guilty as charged and sentenced to twenty years imprisonment as stated earlier. His appeal to the High Court to challenge both the conviction and sentence, proved futile, hence the present appeal.

Before this Court, the appellant proffered eight (8) grounds of appeal to the effect that: **one**, PW2 had failed to answer the questions put to her

during cross examination; **two**, there was no evidence to corroborate PW2's testimony in terms of section 127(7) of the Evidence Act, Cap 6 R.E 2002 (herein after the Evidence Act); **three**, the lower courts had relied on speculative ideas against the appellant; **four**, the case against him was not proved beyond reasonable doubt; **five**, evidence of PW2 was received contrary to section 127(2) of the Evidence Act; **six**, the lower courts relied on contradictory and unreliable evidence from PW1, PW2, PW3 and PW5; **seven**, failure by the lower courts to note that initially the appellant was charged with rape and; **eight**, that the prosecution had failed to call material witnesses.

At the hearing, the appellant appeared and argued the appeal in person. Being a layman, he presented his already prepared written submissions apparently in terms of Rule 74 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), opposing the decision by the High Court. He implored us to adopt the material contents of his submissions, consider the grounds as presented and finally allow the appeal.

For its part, the respondent, Republic, was represented by Ms. Jenipher Massue, learned Principal State Attorney who was ably assisted by Ms. Veronica Moshi, learned State Attorney. At the very outset, Ms Moshi who addressed the Court informed us that, the respondent was supporting the appeal.

It was however Ms. Moshi's submission, after going through the appellant's written submissions that, the evidence of PW2 was recorded according to law, that is, in terms of Section 127(2) of the Evidence Act. She said that, the trial court had directed itself properly by causing the witness who was a child of tender age to promise to tell the truth before it went on to receive her evidence.

Nevertheless, it was the learned State Attorney's stance that, despite the evidence of the victim having been recorded according to law, failure by PW2 to answer the questions put to her by the appellant by way of cross examination, went contrary to the spirit of section 229(3) of the CPA. In support of this position, the learned State Attorney referred us to our earlier decision in the case of **Pantaleo Teresphory vs. Republic**, Criminal Appeal No. 515 of 2019. She went on submitting that, what is more, the record is silent on the nature of the questions that were put to PW2 by way of cross-examination. It was her further submission that, as the matters stand, the evidence of PW2 was not tested by way of cross examination and therefore it could not be relied upon to ground a conviction.

As for the remaining evidence subsequent to the discrediting of the evidence of PW2, the learned State Attorney submitted that, the said witnesses that is PW1, PW3, PW4 and PW5 did not give direct testimonies regarding the commission of the offence by the appellant. Their evidence

according to the learned State Attorney, and correctly so in our respectful view, was simply hearsay from what they might have been told by the victim. As to the medical evidence, though proving that indeed the complainant was penetrated, Ms. Moshi submitted that, the said evidence did not prove that it was the appellant and no one else who had inserted the blunt object into the victim's private parts. The result of this, according to the learned State Attorney was that, the said evidence was of very little if at all any evidentiary value in as far as the identity of the culprit is concerned.

With regard to the evidence of PW3, Ms. Moshi submitted that it appears to be contradictory of the evidence given by PW1 and PW4, because, while PW1 told the trial court that after the victim came back from the shop, she was quite well and she went on playing with other children, the medical evidence shows that she was experiencing great pains. This contradiction, the learned State Attorney submitted, is not minor as it goes to the root of the matter. In that regard, Ms. Moshi submitted further that, the entire of the remaining evidence was insufficient to support a conviction.

In rejoinder, it was all downhill to the appellant, having received no resistance from the respondent. He only prayed the appeal to be allowed and implored us to set him free.

Having gone through the written submissions by the appellant and the oral submissions made by the learned State Attorney, we wish to start with

the critical point argued by Ms. Moshi in relation to the promise by PW2 to tell the truth and not lies immediately before she gave evidence. Thus, the issue for our determination is whether or not, the evidence of PW2, a child of tender age was received in compliance with section 127 (2) of Evidence Act. In this circumstance, it is proposed that we start with the provisions of section 127 (2) of the Evidence Act, which states that:-

> *"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."*

Notably, in terms of section 127 (4) of the Evidence Act, a child of tender age is a child whose apparent age is not more than fourteen years. In this context, and if we may recapitulate, the question we intend to investigate and finally determine is, whether or not PW2, being a child of tender age, had promised to tell the truth and not lies, in line with the above quoted law before she went on to testify. Inevitably, that question takes us to pages 8 of the record of appeal where the record of the proceedings reads as follows: -

> ***PW2**:- Noela Kisanga, 4 years old, I am Christian.*
> ***Court**:- I am satisfied that the child posses enough intelligence to speak. She promised to speak truth.*

The appellant contends that, for all purposes and intents, the above extract does not conform with the requirement envisaged under section 127(2) of the Evidence Act. In support of his position, he referred us to the case of **John Mkorongo James vs. The Republic**, Criminal Appeal No. 498 of 2020 and **Godfrey Wilson vs. Republic**, Criminal Appeal No. 168 of 2018 (both unreported).

As it will be noted from our earlier decisions, for the trial court to comply with the requirement of the law, the promise by the child witness must be actual and it has to be clearly recorded in the proceedings. There are authorities galore in support of this position. For instance, in **Yusuph Molo v. Republic**, Criminal Appeal No. 343 of 2017, we stated 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 must be reflected in the record of the trial. If such a promise is not reflected in the record it is a big blow in the prosecution case."*

In the instant case, while the trial magistrate's recording of the proceedings left much to be desired, it is clear that PW2 had promised to tell the truth and by extension, not to lie, before she started giving evidence. It follows therefore that the question as to whether or not, section 127 (2)

of the Evidence Act was duly complied with, is resolved in the affirmative: (See our decision in the unreported case of **Amos Zakaria v. Republic**, Criminal Appeal No. 74 of 2021).

However, we wish to point out and subsequently grapple with a different shortfall in the evidence of PW2 which must have affected her credibility. When she was subjected to cross-examination, she kept quiet without responding to the questions put to her by the appellant. For demonstration, we will again let the record speak by itself;

> ***XXD by Accused***:- *Nil*
> ***Court***:- *The girl keeps quite; she does not answer any question although asked more than five questions.*

The silence exhibited by PW2, Ms. Moshi submitted, was prejudicial to the appellant as he was technically denied of his right to cross-examine a witness implicating him in terms of Section 229(3) of the CPA which provides thus;

> *"(3) Where the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness or make any statement."*

It cannot be gainsaid that in the light of the above provision, that the accused person in any criminal trial has an exclusive right to cross-examine any prosecution witness. On this, we feel compelled to observe as we did in the case of **Kurwa Makomelo and Two Others v. Republic**, Criminal Appeal No. 15 of 2014 (unreported) that, there are some questions which may be put to a witness in cross-examination which can or may not be put in examination in chief. Those are set out in section 155 of the Evidence Act, which is reproduced below, thus:-

> *"155. When a witness is cross-examined, he may, in addition to the questions herein before referred to, be asked any questions which tend:-*
>
> *a) **to test his veracity**;*
>
> *b) to discover who he is and what is his position in life; or*
>
> *c) **to shake his credit**, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."*
>
> ***[Emphasis provided].***

Given the above position of the law, we wish to reiterate our position in the case of **Pantaleo Teresphory** (supra) in which we held that, the testimony of PW2 could not form the basis of a conviction as the appellant

was not accorded the opportunity of testing its truthfulness by way of cross examination. Likewise, in the instant case, there is no difficulties in discrediting the evidence of PW2 as we hereby do.

Now, having discredited the evidence of the victim, we think, with respect, that as correctly submitted by Ms. Moshi, the evidence of PW1, PW3 and PW4 cannot stand on its own in proving the case against the appellant beyond reasonable doubt. The reason being that, there was only one eye witness to the commission of the alleged offence and therefore, none of the remaining witnesses can confirm that they saw the appellant commit the charged offence.

As to the medical evidence, there is no gainsaying that it was crucial in establishing some of the elements of the offence with which the appellant stood charged. Being the evidence of a medically qualified person, it was capable of providing important information outside the knowledge of the court. However, that evidence was specifically and exclusively meant for corroboration, that is, strengthening or confirming the already existing evidence which, as we have amply demonstrated, in this case, is materially wanting.

On the other hand, the evidence of PW1, much as it is based on what she was told by the victim whose evidence we have already discredited, is nothing but hearsay and therefore, unbelievable evidence.

For the above reasons, we have no hesitation to conclude that, the prosecution case was not proved beyond reasonable doubt as required by law. In the ultimate event, we allow the appeal, quash the appellant's conviction and set aside the sentence meted out on him. We order for his immediate release from prison unless his continued detention is in relation to some other lawful cause.

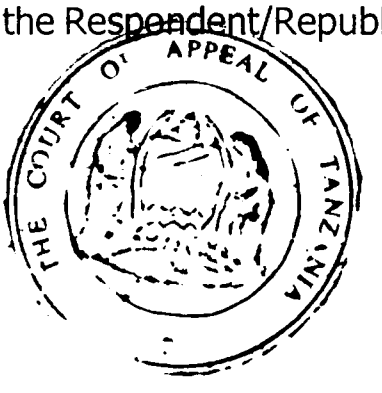
DATED at **MOSHI** this 22nd day of March, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2024 in the presence of the Appellant in person and Ms. Bertina Tarimo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL