IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 243 OF 2020

(Arising from Criminal Case No. 237 of 2020 at the district court of Bagamoyo)

NASRI AHMED HASSAN .....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order:28/4/2021
Date of Judgment:19/5/2021

MASABO, J.L.:-

The appeal is against the conviction and sentence metered against the appellant by the district court of Bagamoyo after it found the appellant guilty of carnally knowing one SG, a boy child aged 5, against the order of nature contrary to section 154 (1)(a) and (2) of the Penal Code [Cap 16 RE 2019]. The trial court was told that, SG met his ordeal on 18th July 2018 at the appellant's shop where he had been sent to buy soap. On arrival at the shop, the appellant took him inside the shop where he unzipped his trouser, took out his penis and inserted it into SG's anus and had carnal knowledge of him against the order of nature.

One Mwanvua, a passerby, spotted them as they were *infragrante delicto*. She rushed to SG's home which is just a few meters from the shop and broke the terrible news to SG's mother who, allegedly fainted for a few minutes

and when she regained her conscious, SG was already back. The said Mwamvua then accompanied SG and his mother to chairman to report the incident and thereafter they went to appellant's shop and had the appellant arrested by PC Jacob (PW3).

Believing in his innocence, the appellant has moved this court to quash and set aside the conviction and sentence metered against him on the ground that; **First**, his conviction was grounded on the evidence of SG (PW2) whose testimony was uncorroborated and irregularly obtained in contravention of section 127(2) of the Evidence Act, Cap 6 RE 2019; **Second,** the prosecution did not prove their case as they did not summon Mwamvua who was the eye witness as she allegedly found the appellant *infragrante delicto*; **Third,** exhibit P1 (PF3) and Exhibit P2(caution statement) were irregularly admitted in court without being read aloud as per the requirement of the law; **Fourth,** the prosecution's evidence was mainly hearsay and fabricated by Mwamvua with whom he had a misunderstanding; **Fifth**, the evidence of PW4, a medical doctor who examined SG, controverted the prosecution case as he testified that SG was not carnally known against the order of nature **Sixth,** there were material contradiction in prosecution witnesses; and **seventh**, the age of the victim was not proved. Thus, the prosecution case was not proved to the required standards.

Hearing of the appeal proceeded in writing at the request of the appellant. In his submission in support of the appeal, the appellant, with regard to compliance with section 127 (2) of the Evidence Act, argued that, SG who

was at the age of 5 years at the date of hearing did not promise to speak truth, thus his evidence was wrongly admitted. The case of **Godfrey Wilson v R**, Criminal Appeal No. 168 of 2018, Court of Appeal of Tanzania (unreported) was cited in support of this argument. Based on this case, it was argued that since the testimony of the victim of sexual offence is the best evidence, if this evidence is expunged there will be no evidence upon which to sustain the conviction.

In the alternative, it was argued that even if the evidence of PW2 was sustained, it would be insufficient to sustain the conviction as it was uncorroborated. Here, the appellant referred the court to the case of **Abdullahman Mboja v R** Criminal Appeal No. 12 of 2017, CAT (unreported) and we were told that, the doctor who would have corroborated PW2's account contradicted her story as he testified that PW2 was not carnally known against the order of nature. It was also argued that, the testimony of PW1 who is SG's mother is of no help as she did not inspect SG to ascertain if he was carnally known against the order of nature. Lastly, it was argued that, the testimony of PW3 the chairman and that of PW1 was contradictory on who reported to the chairman. Whereas PW1 stated that, when she went to report the incidence, she was in the company of Mwamvua and PW2, PW3 stated that, those who reported the incidence was Mwamvua and PW2.

Regarding the age of the victim, it was argued that, contrary to the requirement of the law, the age of the victim was not proved. Regarding the

procedural irregularity on the admission of Exhibit P1 and P2, it was argued that failure to read out the content denied the appellant of his right to know what was written in the said documents. The case of **Abdulhman Mboja v R** (supra) was once again cited in support. On the omission to summon Mwamvua, it was argued further that being the eye witness to the incidence, she was a material witness. Thus, the omission to summon her was fatal as it pinched deep holes to the prosecution's case.

Save for irregularities in the admission of Exhibit P1 and P2 to which she conceded, Ms. Rose Ishabakaki, learned State Attorney who appeared for the respondent, sternly rebutted. Regarding compliance with section 127 (2) of the Evidence Act, she argued that the requirement was dully complied with as seen in page 9 of the proceedings. On the omission to summon Mwamvua, reliance was placed on section 143 of the Evidence Act and the case of **Selemani Makumba v R** [2006] TLR 379 was cited in support of the argument that the law does not require a specific number of witness. Hence, the omission to summon Mwamvua is of no effect as the evidence rendered by the prosecution witness was sufficient to warrant a conviction. In any case, it was argued, the evidence of a victim of sexual offence is the best evidence. It can warrant a conviction even if it was not corroborated as per section 127(6) of the Evidence Act and as stated in **Joel Ngailo v R,** Criminal Appeal No 344 of 2017 CAT (unreported).

Regarding the testimony of PW4, it was submitted that although it is true that PW4 testified that there were no signs that PW2 was carnally known

against his order of nature and it is undisputed that her mother did not instantly inspect him to see if he had been carnally known, the testimony of PW2 which is the best evidenced under the circumstances is sufficient.

As for the MM's age, we were told that there was sufficient proof as her mother testified that she was of 5 years and the case of **Mzee Ally Ally Mwinyimkuu@ Babu Seya v R**, Criminal Appeal No. 499 of 2017 (unreported) was cited in support. In the alternative it was argued that, the age of the victim is of less relevance as section 154 of the Penal Code under which the appellant was charged is not pegged on the age of the victim. This marked the end of the submission.

Having considered these submissions and the original record which I have thoroughly scrutinized, I am now ready to embark on the determination of the appeal. This being a first appeal, my main task is to re-evaluate the entire evidence adduced at the trial and subject it to a critical scrutiny and arrive at an independent decision on the points of appeal raised by the appellant.

Regarding the first ground of appeal, our law deems every person as a competent witness unless he is considered to be incapable of understanding the questions put to him or of giving rational answers to such questions by reasons of tender age, infirmity, old age or any other cause. Where the witness is of tender age, his/her evidence can only be taken after she/he has

promised to speak the truth and not to tell lies as per section 127(2) of the Evidence Act which states that;

> 127(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 requirement imposed by this section is a mandatory requirement. As held in **Godfrey Wilson v R** Criminal Appeal No. 168 of 2018, CAT (unreported);

> "section 127(2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/ she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age."

In the present case, the record reveal that when PW2 testified in court on 12th September 2018 he was 5 years old. Thus, he was a child of tender years as per section 127(4) of the Evidence Act and, therefore, subject to the requirement of section 127(2). The major question for determination is in this point is whether, in reception of PW2's testimony, the trial court complied with the mandatory requirement of section 127(2). Having examined the records, it would appear vividly that the trial magistrate was well acquainted with the mandatory requirement under section 127(2). However, he stumbled on the procedural aspect. This is well demonstrated through the proceedings appearing on page 9 of the word-processed proceedings. Instead of recording the exact words said by PW2, the trial

court magistrate gave a citation/paraphrase of the promise contrary to the well-established practices. The following excerpt from the proceedings is self-explanatory on what transpired in court prior to the reception of PW2'evidence.

> "PW2: MMM: 5 YEARS
> **Court**: After interview with the witness as per section 127 of the CPA, I found that the witness knows not the nature of oath though he promises to speak the truth"
>
> Sign
> SRM
> 12/09/2018.
>
> PW2: MM: 5yrs, not sworn."

After this, introductory procedures, the court proceeded to record PW'2 testimony as unsworn evidence. In the learned state Attorney's view, the above proceedings suffice as proof as to compliance with section 127(2). With respect, I do not subscribe to this view as what we see in the proceedings is the citation by the trial court magistrate of the promise purportedly made by PW2. Whereas the law is silent on how to record the promise, the Court of Appeal in **Godfrey Wilson v R** (supra) gave an articulate guidance on what is expected of the court where it stated that,

> The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows:
> 1. The age of the child.

2. The religion which the child professes and whether he/she understands the nature of oath.
3. Whether or not the child promises to tell the truth and not to tell lies.
Thereafter, upon making the promise, such promise must be recorded before the evidence is taken.

Thus, in this case, the answers ought to have been properly recorded. The trial court's omission to record the answers in PW2's direct words is, in my view, fatal. Besides, even if I were to align my finding with the learned State Attorney's view, the promise cited by the trial magistrate would remain incompetent as it is incomplete. Whereas the law mandatorily requires the child witness to promise to tell the truth and not to tell any lies, the promise cited by the trial magistrate only covers the first aspect of the promise, that is the promise to tell the truth. As the second aspect of the promise, that is, the promise not to tell lies, is not reflected, the magistrate's citation of the promise is incomplete hence legally untenable. Thus, there is no gain in insisting that the testimony of PW2 was accurately procured. Accordingly, I find and hold that the testimony of PW2 was irregularly procured contrary to the provisions of section 127(2) of the Evidence Act Cap 6 RE 2019.

As for the fate of this evidence, the position of law is as held by the Court of Appeal in **Masoud Mgosi vs Republic,** Criminal Appeal No. 195 of 2018 and **Abdallah and Nguchika vs Republic**, Criminal Appeal No. 182 of 2018 (all unreported), that, evidence taken in violation of section 127(2) of the Evidence Act is invalid and with no evidential value. Hence, it should be disregarded as it is hereby done.

The question that emerges out of this development is whether the conviction can be sustained in absence of PW2's evidence. I will answer this question in the negative owing to the reason that, as submitted by the parties the evidence of the victim of a sexual offence is the best evidence and, in its absence, the conviction can hardly be sustained unless there is decisive independent evidence implicating the appellant such as evidence of an eye witness which in this case is missing. As submitted by both parties, one Mwamvua, who was the only eye witness to the incidence was not summoned to testify.

Thus, when the evidence of PW2 is disregarded, we are left with two pieces of evidence. The first piece contains the caution statement and PF3 which were admitted as exhibit P1 and P2, respectively. This evidence, as submitted by both parties is incompetent owing to fatal irregularities in the admission process. As conceded by all the parties, the contents of these document were not read out in court after their admission. This omission is fatal. It has rendered the two documents ineffective and liable for expungement as held in **Rashid Kazimoto & Masoud Hamis Vs. Republic**, Criminal Appeal No. 558/2016, Court of Appeal at Mwanza (unreported). Accordingly, they are expunged from the record.

The second residual evidence, is the testimony of PW4, a medical doctor who examined PW2. However, as argued by the appellant, his testimony was of no help to the prosecution's case as he controverted the possibility that

PW2 was carnally known against the order of nature. Besides, even if it was not controverted, it would not have sustained the conviction as the medical report/evidence does not implicate the accused. At best, such evidence serves to prove that the complainant was carnally known against his order of nature which, can not in itself sustain the appellant's conviction in the absence of concrete evidence implicating him.

In the cumulative effect of what I have stated above, it can be safely concluded that there is no material evidence to sustain the conviction and sentence imposed by the trial court. For these reasons, I allow the appeal, quash and set aside the conviction and sentence and order the immediate release of the appellant unless he is otherwise held in custody for a lawful cause.

DATED at DAR ES SALAAM this 19th day May 2021.

THE HIGH COURT OF TANZANIA

J.L. MASABO

JUDGE