IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 215 OF 2020

(Originating from the decision of the District Court of Ilala at Samora in criminal Case No. 658 of 2018 before Hon. E. Nassary, **RM** dated 27/07/2020.)

THABIT KIBWANA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

14th June, 2021 & 18th June, 2021.

E. E. KAKOLAKI J

The appellant in this appeal is challenging the judgment of the District Court of Ilala at Samora in criminal Case No. 658 of 2018, handed down on 27/07/2020, convicting him of the offence he stood charged with and sentence him to 30 years imprisonment plus an order to compensate the victim Tshs. 500,000/=. He has advanced four (4) grounds of appeal in a bid to protest his innocence, going thus:

1. That, the Trial Magistrate erred in law and fact as she failed to assess the credibility of the (PW1) the child of the tender age as in the judgment learned magistrate misdirected herself as she admitted that

there is demeanour when the said child (PW1) gave his evidence. Thus, such evidence was usually unreliable and should not be relied to convict the appellant.

2. That, the Trial Magistrate erred in law and in facts as he omitted to complied with mandatory provision of the law whereby she was required to record in the proceeding that the child of tender age (PW1) promised to tell the truth to the court and not to tell lies before giving evidence.
3. That, the Trial Magistrate erred in law and fact as she failed to recognize that the charge sheet had no necessary particulars for giving reasonable information. Thus, she said charge was incurably defective.
4. That, the Trial Magistrate erred in law and fact by failure to prove the case beyond reasonable doubt.

Briefly the appellant was arraigned before the trial court facing a charge of **Unnatural Offence**; Contrary to section 154(1)(a) of the Penal Code, [Cap. 16 R.E 2002]. It was prosecution's case that the appellant on diverse dates in 2018 at Tabata Chama area within Ilala District in Dar es salaam Region, did have carnal knowledge of one N.P, a boy of 9 years of age against the order of nature. The initials of N.P has been employed to disguise the identity of the child for the purposes of preserving his rights.

When called to answer his charge the appellant denied the allegations levelled against him, the result of which prosecution called in four witnesses being the victim himself (PW1), his mother PW3, PW1's neighbour PW4 and the clinical officer (PW2) to prove its case, whereas the appellant entered his defence as DW1 and called in one witness DW2. At the end of the day

the trial court found the prosecution case was proved beyond reasonable doubt against the appellant, and proceeded to find him guilty of the offence charged with, convict and sentence him to 30 years imprisonment with an order to compensate the victim Tshs. 500,000/=. The appellant being aggrieved with that conviction, sentence and compensation order has filed this appeal equipped with the above cited grounds of appeal.

When the matter came for hearing of the appeal on the 14/06/2021, both parties appeared represented and were heard viva voce. The appellant who chose not to be present during the hearing proceedings hired the services of Ms. Agatha Fabian learned advocate whereas the respondent was represented by Ms. Janipher Masue, learned Senior State Attorney. When submitting on the grounds in support of the appeal Ms. Fabian chose to combine the 1st and 2nd grounds of appeal and argue them together while the rest were argued separately. On the 1st and 2nd grounds of appeal she contended the trial court received unsworn evidence of the victim and star witness who was of tender age in contravention of the provision of section 127(2) of the Evidence Act, [Cap. 6 R.E 2019], thus rendering his evidence valueless. She said, the cited provision makes it mandatory for the trial court before reception of unsworn evidence of the child of tender age, to make sure that the witness promises to tell the truth to the court and not to tell lies, the procedure which was not followed by the trial court. She referred the court to its decision in the case of **Tegemeo Kachira Vs. R**, (DC) Criminal Appeal No. 8 of 2019 (HC - unreported), where this Court found the testimony of the child of tender age made without promise of telling the truth is valueless and could not sustain conviction. Relying on that case she invited the court to uphold the ground and allow the appeal as apart from

the evidence of PW1 there was not any other evidence upon which this court could confirm conviction of the appellant on the offence charged with.

As to the 3rd ground she argued, the particulars of offence in the charge sheet were missing some important information to inform the appellant as to when the offence he was being accused and convicted with was committed. She had it that, the statement *"on diverse dates in 2018"* in the particulars of offence without specifying the starting date and ending period, was not sufficient enough to inform the appellant the period within which he is accused to have committed the offence charged with, so that he could prepare a sound defence, thus the charge was defective, and therefore conviction based on it could not stand as it deserves to be quashed. On the 4th and last ground she argued, the prosecution case was not proved to the required standard as the prosecution failed to parade in court material witnesses such an investigator of the case to prove its case beyond reasonable doubt. On the basis of her submission she invited the court to quash the appellant's conviction and set aside the sentence and order meted to him by the trial court.

In her reply submission Ms. Masue for the respondent from the outset informed the court that, they were not resisting the appeal. On the 1st and 2nd grounds she supported the appellant's submission in that, it is true the procedure for recording the evidence of the child of tender age as provided under section 127(2) of the Evidence Act, was infracted by the trial court to the extent of rendering the evidence of PW1 and the only eye witness, unreliable and valueless. She argued, it was mandatory for the trial court to have PW1 promise to tell the truth and not lies first, before proceeding to

record his evidence. As the proceedings were silent on the compliance of that procedure the evidence recorded was equated to no evidence at all since the procedure for recording such kind of evidence was well articulated in the case of **Godfrey Wilson Vs. R**, Criminal Appeal No. 168 of 2018 (CAT-unreported). It was her submission that, since PW1's evidence was recorded in contravention of the mandatory procedure of the law then, it could not be used by the court to sustain conviction against the appellant. On the 3rd ground she submitted against Ms. Fabian's submissions that, the charge was proper as the particulars though missed the specific dates on which the offence was committed, the omission was not fatal as the particulars were enough to afford the appellant enter his defence and in fact he did it successfully. As regard to the 4th ground she countered that, the evidence of investigator in this case was not important and mandatory as submitted by Ms. Fabian since under section 127(7) of the Evidence Act, the evidence of victim of sexual offences like the one at discussion is enough to convict the accused if the court believes it. She however argued in support of the appeal that, since the evidence of the victim (PW1) has to be expunged, and since there is no any other remaining eye witness to tell the court as to who committed the offence to PW1 as the remaining evidence PW2 on the medical examination report PF3 is also wanting for not being read over after its admission, the prosecution case remains unproved. On the effect of documentary evidence admitted without being read aloud in court, she cemented her stance by citing the Court of Appeal case in **Lack Kilingani Vs. R**, Criminal Appeal No. 402 of 2015 (CAT-unreported) where the court said, admission of exhibit as evidence must undergo three stages namely clearing, admitting and read out. As in this case the PF3 was not

read out it cannot also be relied by this court to convict, Ms. Masue, stressed. In view of her submission this court was informed the appeal has merits. Ms. Fabian had no rejoinder to make and that marked the end of submissions by both counsels.

I have paid due consideration to the submissions from both parties as well as travelling through the impugned judgment as well as the trial court proceedings. I find it pleasing to make it clear from the outset that, this appeal is not contested by the respondent for the reasons stated herein above by Ms. Masue, learned Senior State Attorney. What is being assailed through the 1st and 2nd grounds of appeal is the procedure adopted by the trial court to record evidence of star witness in this case PW1 the child of 9 years old when testifying. It is the law under section 127(2) of Evidence Act, that when recording the evidence of a child of tender age without making oath or affirmation his promise that he will tell the court nothing but the truth and not lies must be obtained by the court. The provision reads:

> *(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 above section was given a broad interpretation by the Court of Appeal in the case of **Godfrey Wilson** (supra) as to the conditions attached to it when recording evidence of the child of tender age. The Court stated:

> *"To our understanding, the above provision as amended, provides two conditions.* ***One****, it allows the child of tender age to give evidence without oath or affirmation.* ***Two****, before giving evidence, such child is mandatorily required to* ***promise to tell***

the truth to the court and not to tell lies. *" (Emphasis supplied)*

As to what should a trial magistrate do in order to obtain that promise in the same case the Court of Appeal went further to state:

> *"... The trial Magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 127(2) as amended imperatively requires a child of 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 tender age. 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.*** *" (emphasis is supplied)*

In view of the above position of the highest court of the land, I am left with no doubt that it is mandatory for the trial magistrate to record first the witness answers on whether he/she promises to tell the court the truth and

not tell lies before reception of his evidence. Now applying that position to the facts of this case, it is obvious to me the provision of section 127(2) of Evidence Act was infracted as submitted by Ms. Fabian. I so say as a glance of an eye to the typed proceedings of the lower court has unveiled the fact that no inquiry was ever conducted by the trial magistrate to PW1, the child of tender age aged (9 years old as per exh. P2 birth certificate) , asking him the suggested questions and have his answers recorded before his evidence was received. To let the record speaks for itself, I quote PW1's introductory part of his evidence from page 13 of the typed proceedings:

> *"**PW1**:N.P, 10 years, Ukonga, Magereza, class III at Juhudi Primary School, Christian, the child will give his evidence without swearing.*
>
> *He explained/stated that: We are living with my parents and other relatives including my sister and fellow brothers..."*

As per the above excerpt of the evidence of PW1, it is clear to me that the procedure for recording the evidence of the child of tender age was not followed at all by the trial court, the result of which is to render his evidence invalid as it is of no evidential value. Since the said evidence has been rendered valueless the remaining issue is whether there is other evidence to be relied on by this Court to sustain conviction of the appellant. The answer to that question in my opinion is no, as apart from him (PW1) nobody else witnessed the appellant committing the alleged act of unnatural offence to him. The medical evidence of PW2 as depicted in PF3 exhibit P1 has the effect of only proving the victim PW1 had his anus penetrated but cannot point out who perpetrated the said unlawful act. It is therefore my conviction

that in such situation there is no any other evidence to corroborate the evidence of PW2 so as to sustain conviction of the appellant. In view of that finding, I find the first two grounds argued together to have merits and I sustain them. These two grounds have the effect of disposing of this appeal and I see no pressing issue demanding for consideration of the rest of the grounds.

In the circumstances and for the fore stated reasons, I allow the appeal, quash the conviction and set aside the sentence and compensation order imposed against the appellant. This has the effect of ordering immediate release of the appellant from the prison, unless otherwise lawfully held.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of June, 2021.

E. E. KAKOLAKI

JUDGE

18/06/2021

Delivered at Dar es Salaam in chambers this 18th day of June, 2021 in the presence of Mr. Agatha Fabian advocate for the appellant, and Ms. Asha Livanga, court clerk and in the absence of the respondent.

Right of appeal explained.

E. E. Kakolaki

JUDGE

18/06/2021