IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 135 OF 2021

SAID SALUM LONGA @BABA ABDUL.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(*Originating from Judgment of the District Court of Temeke in Criminal Case No. 79 of 2019)*

JUDGMENT

Date of last order: 8/10/2021
Date of judgment: 12/11/2021

LALTAIKA, J.

The appellant, **SAID SALUM LONGA @BABA ABDUL** was charged before the District Court of Temeke with the offence of rape contrary to sections 130(1)(b) and 131 (1) of the Penal Code, Cap. 16 R.E.2019. The particulars that were laid in a charge showed that the appellant on 27th day of December, 2018 at Kiburugwa Area within Temeke District in Dar es Salaam had carnal knowledge with FAM (identity of the victim is concealed) a girl of 11 years without her consent.

Pursuant to the said allegation, a trial was conducted and the appellant was convicted and sentenced to 30 years' imprisonment. Aggrieved by both conviction and the sentence, the appellant has appealed to this court. In his memorandum of appeal, the appellant has fronted a total of nine grounds. However, for reasons which will be apparent shortly, I take the liberty not to reproduce them. When the matter was called up for hearing, the appellant appeared in person whereas Ms. Christine Joas, learned senior state attorney, appeared for the respondent.

Arguing on the first ground in support of this appeal, the appellant submitted that the charge sheet did not comply with the requirements of section 132 and section 135 (a) (ii) of the Criminal Procedure Act. The appellant contends that that the charge did not specify the particulars of the offence nor gave a description of the nature of the offence. As a result, the appellant avers, he was not able to prepare for his defence. The appellant referred this court to the case of **Osward Abubakar Mangula vs Republic, Criminal Appeal No.153 of 1993 TLR 2000.**

Arguing on the third ground of appeal which relates to non-compliance to section 127(2) of the Tanzania Evidence Act, the appellant opines that non-compliance to the aforementioned provision is fatal. He insists that the same cannot be cured by re-trial. In his written submission, the appellant expounded on the aforementioned section which requires a child of tender age to promise to tell the truth. Referring to page 5 of the trial court's proceedings, the appellant submitted that the trial court did not ask PW1 (the victim) to promise to tell the truth as per the mandatory requirement of section 127 (2) of the Tanzania Evidence Act. To amplify

his statement the appellant referred this court to the case of **Godfrey Wilson vs Republic, Criminal Appeal No.168 of 2018.**

In line with the above argument the appellant is of the view that the evidence of PW1 be expunged from the court records. In the event of doing so, the Appellant contends, the remaining evidence cannot support his conviction. This is because the same is not corroborated in the absence of the, supposedly, discredited evidence of PW1.

Arguing on the sixth ground, the appellant submitted that the failure to read aloud Exhibit P1 after it was admitted occasioned a procedural irregularity which denied him his right to understand the nature and substance of facts contained in the said exhibit. As a result, the appellant contends, this made it difficult for him to prepare for his defence. To buttress his argument the appellant cited the cases of **Robinson Mwanjisi & Others vs Republic (2003) TLR 218** and **Saganda Saganda Kasunzu vs Republic, Criminal Appeal No.53 of 2013**.

Arguing on the seventh ground, the appellant faulted the trial court for omitting to consider the defence evidence. He indicated that the judgment of the trial court only analysed and considered the evidence of the prosecution case. The appellant stressed that consequences of such failure to consider the defence case was prejudicial to his right to a fair trial. He invited the court to refer the cases of **Hussein Idd & Another vs Republic (1986) TLR 166**, **Alfred Valentino vs Republic**, **Criminal Appeal No.92 of 2006** and **Yasin Mwakapala vs Republic, Criminal Appeal No.604 of 2014.**

Responding by conceding to this appeal, the learned senior state attorney Ms. Joas opted to focus on two issues namely the trial court's judgment and non-compliance to section 127 of the Tanzania Evidence Act. Ms. Joas opined that the two were sufficient to weigh this appeal on merit. Although Ms. Joas is in agreement with the appellant that the trial court did not consider the evidence of the accused person in its judgment, she is of the considered view that the same could be cured by the provisions of section 388(1) of the CPA.

Ms. Joas opines further that she does not consider such curing the same to be of any value. The learned senior state attorney elaborated further that since PW1's testimony is incapable to move the court to uphold the conviction due to irregularities that have been explained, curing the judgement wouldn't be of much help. To this end, the learned senior state attorney prayed for this court to allow the appeal and acquit the appellant.

From the submissions of both parties, I am intrigued to pursue, albeit briefly, the issue of non-compliance to section 127(2) of the Tanzania Evidence Act, Cap 6 R.E.2019. I am especially interested to expound on the mandatory nature of the provision. For purposes of clarity, I find it prudent to reproduce the section as hereunder:

> *"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".*

In my assessment on whether trial court had complied with the said provision of the law, I am fortified to reproduce the extract of what was recorded by the trial court:

> *Court: Prosecution case starts with PW1,*
>
> *PW1: Fauzia Awadhi, Kiburugwa, Student, 11 years old, Muslim;*
>
> *PW1: I am eligible to last before this court, I am going to state the truth.*

It is glaring from the above record that the testimony of PW1 was not taken in accordance with the cited provision of the law. The trial court did not conduct an inquiry to satisfy itself whether PW1 understood the nature of oath so as to give evidence under oath, or if she did not understand the meaning of an oath so the trial magistrate could ask her to promise to tell the truth. This court was of the same view in the case of **Denis Joram @ Denis Masenga vs Republic, Criminal Appeal No. 78 of 2020** where it held that:

> *"Section 127 (2) of the Evidence Act as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 Act No 4 of 2016 which became operative on 8th July, 2016 provides thus a child of tender age may give evidence without taking an oath or making an affirmation but before giving evidence, promise to tell the truth to the court and not to tell lies. It is our considered opinion that the trial court did not comply with the cited provision of the law. This is so because, if after the inquiry the court found that the child knew the meaning of an oath, before giving evidence he ought to have been sworn. Conversely, if it was found that the child did not understand the meaning of an oath,*

before giving evidence, the magistrate ought to have made him to promise to tell the truth to the court and not to tell lies…"

As correctly reasoned by both parties, non-compliance to section 127(2) of the Evidence Act by the trial court renders PW1's testimony without sufficient evidential value. I therefore, hereby expunge it from the record. Having expunged the same, the next question that follows is, should we decide to put the remaining evidence under scrutiny would it still solidify the prosecution case?

At this juncture I join hands with the submissions of both parties that the rest of the prosecution evidence is insufficient to sustain conviction. This is so because in the absence of the evidence of PW1, the evidence of PW2, PW3 and PW4 remain hearsay without corroboration. In the case of **Jumanne O.Manoza vs Republic, Criminal Appeal No.404 of 2019** the court, confronted with similar circumstances had this to say:

"We find, for reasons stated above that the evidence of PW2 cannot by itself prove to the required standard the fact that the appellant is the one who had carnal knowledge of the appellant without other evidence to corroborate it, as conceded by the learned State Attorney, the prosecution failed to prove the case beyond reasonable doubt to the standard required."

Premised on the above analysis, I find that this particular ground on noncompliance to section 127(2) of the Evidence Act is sufficient to determine this appeal. In the event, I see no reason to go on with the rest of the grounds.

I hereby allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison unless his confinement is due to another lawful cause.

E.I. LALTAIKA

JUDGE

12/11/2021