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

CRIMINAL APPEAL NO 208 OF 2020
(Originating from the District Court of Ilala in Criminal Case No. 555 of 2018

JOHN JALOME .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGEMENT

Last order 13/10/2021
Judgment date 17/11/2021.

MASABO, J.:-

The appellant, John Jalome, was convicted by the District Court of Ilala at Dar es salaam of the offence of rape c/s 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 and was sentenced to thirty (30) years imprisonment and compensation of Tshs 500,000/= to the victim. At the trial court, the prosecution alleged that on the 19/7/2017 Stakishari area within Ilala District in Dar es Salaam Region, the appellant did have carnal knowledge of one CM, a girl of 8 years old an allegation which was found by the trial court to have been sufficiently proved hence the conviction and sentence

Aggrieved by the decision of District Court he is now appealing against the conviction and sentence. The appellant's memorandum of appeal contains

twelve grounds of appeal, which can be summarized as follows: **One,** the evidence of PW1 (the victim) was fault as she never promised to tell the truth; **Two,** the age of the victim was not ascertained; **Three,** there were contradictions between PW1 and PW3 on when exactly the offence was committed; **Four,** PW1 failed to name the appellant as perpetrator of the alleged crime. **Five,** the court convicted the appellant basing on non credible and contradictory evidence of PW1; **Six,** the evidence of PW2 was unreliable, **Seven,** the integrity and authenticity of the evidence procured from the witness including the appellant himself was compromised as there was no compliance to section 210(3) Criminal Procedure Act, Cap 20 RE 2019; **Eight,** save for PW4, none of the prosecution witness visited the scene; **Nine,** that evidence rendered prosecution witnesses implausible and unreliable; **Ten,** PW1 and PW2 were not led to identify the appellant by either touching or pointing at him contrary to procedure of the law; **Eleven,** it defeats human reasoning that PW3 failed to inspect her daughter's virgina to ascertain that there was penetration; and **Lastly,** the prosecution failed to prove its case beyond reasonable doubt.

The appeal was partially argued in writing. The appellant who appeared unrepresented preferred to argue the appeal by way of a written submission

which he brough along on the date fixed for hearing. Having perused the same, Ms. Werema prayed to be allowed to respond orally as she intended to support the appeal.

In his written submission, the appellants mostly amplified the first ground of appeal. She argued that, the evidence of PW1 was irregularly procured contrary to section 127(2) of the Evidence Act, Cap 6 RE 2019. His argument in support of this point was that since PW1 was said to be of a tender age of 10 years it was crucial that the taking and admission of her testimony comply with the mandatory requirement under the above provision which requires that a *voire dire* test be conducted to determine the child's intelligence and her understanding of the oath. Several cases were cited in support of the application including **Dhahiri Ally v The Republic** (1989) TLR 27; **Sakila v The Republic** (1967) EA 403.

He further argued that it was crucial for PW1 to promise to tell the truth and not lies as per **Salum Nambaluka v The Republic**, Criminal Appeal No. 272 of 2018, CAT at Mtwara (unreported). As this procedure was not complied with, the evidence of PW1 has been rendered unqualified and

should be discounted and expunged from the record as held in **Joseph Damian @ Savel v The Republic**, Criminal Appeal No. 294 of 2018, CAT at Dar es Salaam(unreported). Citing the case of **Weston Haule v Republic**, Criminal Appeal No. 504 of 2017, CAT at Mbeya (unreported) and **Seleman Makumba v R** [2006] TLR 379; he argued that in sexual offences, the best evidence is that of the victim and when such evidence is unqualified or discounted and expunged from the record, the remaining evidence can hardly secure a conviction especially in this case where the evidence of PW2, PW3, and PW4 was merely hearsay and the PF3 which was a documentary evidence was irregularly procured as it was not read over for the appellant to understand and comprehend its meaning.

Ms. Werema was quick to concede to this ground in her oral submission. She submitted that having received and read the appellant submission, she is of the view that the appeal has merit. She submitted that, she is at one with the appellant's submission on the first ground of appeal as the record show that, there was noncompliance to the provision of section 127(2) of the Evidence Act, Cap 6 RE 2019 as PW1, who was the victim and the key prosecution witness did not promise to tell the truth. Consequently, her

evidence has no weight and should be expunged from the records. After this evidence is expunged, the remaining evidence cannot sustain the conviction as it is merely hearsay. For this reason, the appeal should succeed. In fortification she referred us to the case of **Godfrey Wilson vs Republic**, Criminal Appeal No.68 of 2018, CAT (unreported) and prayed that this court be pleased to allow the appeal. The conviction and sentence be quashed and set aside and he be discharged from prison. Appeased by the reply submission, the appellant thanked the learned State Attorney and reiterated his prayer for quashing and setting aside the conviction and sentence and for discharge from prison.

I have carefully considered the submission by the parties. As both partied have formed a consensus against the evidence of PW1, the main question to be determined is whether the evidenced of this witness offended the provision of section 127(2) of the Evidence Act, Cap 6 R.E 2019 and if so, what is the fate of such evidence and the finding of the trial court as to the guilty of the appellant.

The appellant has submitted on a *viore dire* test. Much as it is no longer relevant and the cases cited are a dead law, I will remark albeit briefly that,

in the past, the law (section 127(2) of the Evidence Act required that evidence of a child of tender years should pass a *viore dire* test whose gist was to test whether the child of tender years, defined under section 127(4) as a child below the age of 14, understands the nature of the oath or possessed sufficient intelligence to appreciate the meaning and importance of truth. The judge or magistrate conducting the *voire dire* test had to ask questions and assess the child's understanding of the nature of the oath and intelligence and at the end of the test indicate whether or not the child of a tender age understands the nature of oath and the duty to tell the truth, and whether he is possessed of sufficient intelligence to justify the reception of his/her evidence.

The procedure was repealed by the amendment introduced to the Evidence Acy by Act No. 4 of 2016 which amended section 127(2) of the Act by substituting the requirement for *voire dire test* with a simple procedure requiring the child to promise to tell the truth and not lies. Exemplifying the gist of this amendment, the Court of Appeal in ***Godfrey Wilson vs Republic*** (supra) established that;

> "to our understanding, the above cited provision as amended, provides for 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."

The Court cited with approval its previous position in **Msiba Leonard Mchere Kumwaga vs Republic,** Criminal Appeal No.550 of 2015 (unreported) where it observed that:

> ".....before dealing with the matter before us we have deemed it crucial to point out that in 2016 section 127(2) was amended vide written Laws Act No 4 of 2016 (Amendment Act).Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies."

It is similarly crucial to note that, in ***Godfrey Wilson vs Republic*** (supra), the Court provided guidance on how trial courts could arrive at the procedure envisaged in the new provision where it stated that,

> "...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. 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.

Back to the lower court record, the evidence of PW1 who was the victim appears in page 10 of the word processed proceedings and the opening paragraph reads as follows:

"PWS: "CM", 10 years Mpogoro, Bonde la mpunga I am a student Mogo primary school, Christian do not know the meaning of an oath"

Court: the evidence of child should be conducted without an oath."

Thereafter, she proceeded to give her testimony as follows:

Pw1: I am studying at studding at Mogo Primary school in class three my school class teacher is teacher Zalka……"

Clear and precise, the procedure applied was fault. Much as PW1 answered the question on whether or not she knew the meaning of oath, the questioning session seems to have ended half way. It would appear that, the learned trial magistrate was about to conduct a *voire dire* test which, as already alluded to earlier, is no longer a legal requirement. Even if it was, the evidence of PW1 would not have passed the test as it ended half way. To pass the current test, the trial magistrate ought to have required PW1 to undertake to tell the truth and not lies. As this was not followed, I concur with the view expressed by both parties that the evidence of PW1 who was of the tender age of 10 was improperly taken hence offends the above cited provision. As submitted by both parties and as held in **Joseph Damian @ Savel v The Republic** (supra), the anomaly has rendered the evidence of PW1 unqualified and should be discounted and expunged from the record as it is hereby done. In view of this, we find the 1st ground of appeal meritorious and sustain it.

Having sustained the 1st ground of appeal, the next step is to proceed to assess whether the remaining evidence is sufficient to warrant and uphold the conviction against the appellant. In view of the record, I unreservedly agree with the learned State Attorney that, it is now trite that, in sexual offences, the best evidence is that of the victim and when such evidence is unqualified discounted and expunged from the record the remaining evidence can hardly secure a conviction (**Seleman Makumba v R** (supra). Admittedly, the remaining evidence in the instant case is very weak and incapable of sustaining the conviction as the evidence of PW3 and PW4 is wholly hearsay thus incapable of incriminating the appellant of the charged offence. I say so because, none of these witnesses saw the appellant committing the crime. Similarly, PW2's evidence and the PF 3 are of no much help as PW2 was not the doctor who examined the PW1 her duty was only to tender the PF3 which was nevertheless, irregularly admitted without its content being read over for the appellant to understand and comprehend its meaning.

Besides, even if we were to assume that everything was perfect with the P3, that alone would not suffice to uphold the conviction as, at best, the value of such evidence is to corroborate the fact that PW1 was raped and does not

answer the crucial question as to who raped her. Under the premise and going by the wisdom of the Court of Appeal in **Seleman Makumba v R** (supra); Masoud **Mgosi v. The Republic,** Criminal Appeal No. 195 of 2018; **Masanja Makunga v. The Republic**, Criminal Appeal No. 378 of 2018 (unreported) and **Hassan Yusuph Ally vs Republic**, Criminal Appeal No.462 of 2019 (all unreported), having uphold ground one which is sufficient to dispose of the appeal, I consequently allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. The appellant, John Jalome, is to be released forthwith from custody unless he is held for another lawful purpose.

DATED at DAR ES SALAAM this 17th day of November 2021.

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

X

Signed by: J.L.MASABO

J. L. MASABO

JUDGE