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

CRIMINAL APPEAL NO. 121 OF 2021
(Originating from the decision of the District Court of Kinondoni in Criminal Case No 241 of 2019 before Hon Lyamuya, PRM)

FREDRICK MSUYA ..... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

9/3/2022 & 27/4/2022

MASABO, J.:-

Fredrick Msuya, the appellant herein, stood charged before the District Court of Kinondoni for the offence of rape contrary to section 130(1), 2(e) and 131(1) of the Penal Code, [Cap 16 R.E. 2019]. It was alleged that on the fateful day, 11th April 2019, at Changanyikeni area within Dar es Salaam region, the appellant raped a girl child aged 4 years conveniently referred to by the trail court as 'Rosebud' in concealment of her identity, a name which we adopt for similar purposes. It was alleged that the appellant being a driver of a school bus used by the victim who was then attending a nursery school (name withheld), raped the victim who had remained in the bus after her fellow pupils and PW5 disembarked from the bus leaving her alone with the appellant. The allegations were found

to have been proved beyond reasonable doubt and upon conviction the appellant was sentenced to serve 30 years in prison.

The appellant is challenging the conviction and sentence. Through the service of Advocate Amin Mshana, he has raised the following grounds of appeal:

(1) *The court erred in law in relying on the evidence of the victim who testified as PW2;*
(2) *The court erred by omitting to consider the defence evidence and by failure to adduce any reason as to why it did not consider the said evidence;*
(3) *The court erred by basing the conviction on a wrong or inadequate analysis of evidence hence prejudicing the appellant;*
(4) *The charge was not proved beyond reasonable doubt;*
(5) *The learned magistrate misinterpreted and misconstrued the evidence recorded by his predecessor; and*
(6) *The court failed to notice/discover the ill motive behind the prosecution witnesses.*

At the hearing of the Appeal, Mr. Amin Mshana learned counsel represented the appellant and the respondent was represented by Mr. Abood, learned State Attorney.

Submitting in support of the appeal, Mr. Mshana argued that, the evidence of PW2 offended section 127(2) of the Evidence Act [Cap 6 R.E. 2019]

which requires a witness of tender age to undertake to tell the truth and not lies before his evidence is recorded. He proceeded that contrary to this law; the trial court administered a *voire dire* test which is no longer a legal requirement. Thus, it is in the interest of justice that the testimony of this witness be disregarded and expunged from the record as held in **Godfrey Wilson V.R,** Criminal Appeal No.168 of 2013, CAT (unreported). He proceeded further that if this evidence is expunged, there will be no sufficient evidence to sustain the conviction and sentence. The case of **Faraji Said V.Republic,** Criminal Appeal No. 172 of 2018, **Hassan Yusuph Ally, V.R**, Criminal Appeal No. 462 of 2019, CAT (all unreported) were cited in further support.

Regarding the 2nd ground of appeal, he passionately argued that the evidence of the appellant in which he denied all the charges against him was disregarded and no reason was advanced as to why it was accorded no weight. In specific, he argued that the court disregarded the fact that PW2 was not the last to disembark from the bus. He also argued that DNA results were not produced. The omission attracted an adverse inference against the prosecution as held in **Mohamed Mustapha @ Rajab and others v R**, Criminal Appeal No. 75 of 2017. While supporting his submission with **Goodluck Kyando V. Republic** Criminal Appeal No.

118 of 1993, he argued further that it is trite that every witness be entitled to credence and his testimony must be believed unless there is a good reason. In further support he cited **Abiola Mohamed @ Simba V. Republic**, Criminal Appeal No. 291 of 2017 CAT (unreported). On the third ground he argued that there were contradictions between PW4: the doctor who examined the victim and PW1. PW1 said that the victim had blood discharge whereas PW4 said he did not see bruises or blood discharge from the victims vagina. Also, PW4 stated that the penetration was of a small penis and there is no proof that the small penis is of the appellant. Moreover, the victim was not immediately taken to hospital.

Mr. Mshana did not submit on the 4th and 5th grounds of appeal. He abandoned them and moved to 6th ground of appeal in which he complained that the DNA results were not produced and that the omission attracted an adverse inference as held in **Mohamed Mustapha @ Rajabu and others v. Republic**, Criminal Appeal No. 75 of 2017. Also, he argued that, an adverse inference ought to have been drawn against the prosecution for failure to call as witness a pupil by the name of Clinton who was the last to disembark from the bus. The case of **Mohamed Othman v. Republic,** Criminal Appeal No. 1 of 2014, CAT, **kanga Daud Nkanga V. Republic** Criminal Appeal no. 316 of 2003, Court Appeal of

Tanzania (all unreported) were also cited in fortification. In a combination of all this he argued that the case against the appellant was not proved to the required standard of proof, that is, proof beyond reasonable doubt.

In Rebuttal, Mr. Abood argued that the evidence of PW2 was properly recorded as before she testified, she was asked whether she can tell the truth and replied in the affirmative, an answer which suffices the requirement in **Godfrey Wilson** (supra). Thus, there is no point in arguing that section 127(2) was offended as it was duly complied with. Consolidating the 2nd, 3rd and 4 grounds of appeal he argued that Section 143 of the Evidence Act explicitly stated that no specific number of witnesses is required to prove a case. What matters most in the quality of the evidence as opposed to quantity of witnesses. Thus the prosecution was not bound to call Clinton as a witnesses and if the defence wished, they could have called him and any other witnesses they considered crucial material.

As regards the evidence of PW4, he argued that being a doctor, PW4 was not expected to prove whose penis penetrated the victim. All he had to tell the court is what he found in the course of examining the victim. He could not conclusively say whether the blunt object that penetrated the

victim was a finger or a penis. His evidence that there was penetration sufficiently corroborated PW2 evidence that the appellant put a "Mnyoo" in her "Chururu", a mnyoo which she seen able drew on a sketch. These considered conjointly show that the victim was raped. Regarding the delay to take the victim to hospital, he argued that it is less consequential as it does not charge the truth that PW2 was raped. As regards DNA test, he submitted that no DNA test was conducted and the present evidence conclusively proved that PW2 was raped by appellant. Besides, he argued that had the appellant wanted a DNA, he could have requested. On inconsistencies, he argued that there are none and if there are any, they are too minor and less consequential as they do not go to the root of the case.

In rejoinder, Mr. Mshana reiterated that Section 127(2) was offended and argued that the defect has fatally affected the prosecution case as the evidence of PW2 ought to be the best evidence. On Section 143 he argued that much as there is no requirement of specific number of witnesses, omission to call material witnesses attracts an adverse inference. This marked the submission by the parties.

This being a first appeal, the main task ahead of this court is to examine and the re – assess the evidence on record to see whether there were misapprehension of the evidence and make a fresh finding where necessary. It is in this premise that, I will, albert briefly revisit the evidence on record.

Seven witnesses testified for the prosecution. PW1 and PW3, had a similar story. They stated that on the fateful day their daughter attended her school routine and came back, but at night they discovered that she used a long time to attend to calls of nature and when they physically cheeked her they discovered that their daughter's faces were mixed up with blood and her pants has semen. When interrogated the victim she told them that the appellant has hurt her Chururu (vagina). On the next day they took her to the school where she narrated the ordeal and named the appellate as culprit. They were thereafter given a PF3 and she took the victim to hospital where it was confirmed that she was raped.

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PW2, the victim stated that the appellant hurt her "chururu" while pointing at her vagina. She stated that the appellant inserted into it a mnyoo which she drew a sketch. Asked where the mnyoo is, she said it is within the appellant's trousers**. PW4,** a medical doctor, examined the

victim on 13/4/2019. He observed that PW2 was walking in normal way and appeared to be physically fit. When he examined her vagina, he found there were neither bruises nor blood discharge but the vagina was open which suggested she was raped. He filled the examination results in a PF3 which was admitted as Exhibit PE. Interrogated in cross examination he stated that penetration appeared to be of a blunt object but a small object which could be a finger or small penis. **PW5** was PW2's teacher who was on the bus on the material day charged with caring the pupils' welfare. She disembarked from the bus leaving behind PW2 and another pupil by name of Clinton. **PW6** (the investigator) and **PW7** (the arresting officer) did not have much to offer)

On the deference side **DW1 –** denied the allegation against him. Although he admitted that PW2 and Clinton were the last to dis embark, he stated that PW2 disembarked before Clinton. **DW2** is the routine driver but on the fateful day he had an emergence leave which transcended into the bus being temporarily driven by the appellant.

Having summed up the submission by both parties and upon scrutiny of the lower court records placed before me I will now proceed to determine the appeal starting with the first ground of appeal which challenged the

credibility of the testimony of the victim who testified before the trial court as PW2. At the centre of this ground is the compliance or otherwise with the provision of section 127(2) of the Evidence Act which permits a child of tender age to appear as a witness in court and sets the modalities upon which the evidence of such witness can be procured. Mr. Mshana has passionately argued that the evidence of this witness who was, in this case, the star prosecution witness, was irregularly procured in total disregard of the procedural requirement set out under the above provision as she did not undertake to tell the truth and not lies. On the other hand, it is Mr. Abood's argument that the provision above was complied with. On our party, we will retreat and leave the following extract from the proceedings unfold what transpired in court on 26/2/2019 when the victim appeared as witness in court and testified as PW2:

> It is for hearing
> I have a witness, a child ....., she is 4 years old
> I pray to proceed with hearing
> **Advocate Ladlaus Michael:** No Objection
> **Court:** Hearing proceeds in court
>
> Before hearing the court has to satisfy itself whether the child possesses sufficient knowledge and understanding
> of the facts: Voire Dire exam be conducted.
>
> Sgd:
> 26/2/2019
>
> VOIRE DIRE EXAMINATION

Court: What is your name?
Child: My name is.....
Court: How old are you?
Child: I'm 5 years old
Court: Where are you schooling
Child: I am schooling at VERITAS Nussery
Court: Can you tell us the truth of the fact/story?
Child: I can tell you the whole truth
court: The child possesses sufficient knowledge to tell the truth, but not under oath

sgd:
26/2/2020.

After this finding by the court, the victim was allowed to testify as PW2 and her evidence was accordingly recorded. Undeniably, as PW2 was 4 years hence of a tender age, the reception of her evidence ought to strictly comply with the law stated above. The question that has exercised the minds of the counsels and of, course this court, is whether the above procedure is compliant to the provision of section 127(2) of the Evidence Act. For easy of reference and clarity, I reproduce the provision below. It states thus:

> "(2) A child of tender age may give evidence without taking an oath or making an affirmation but 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 lies.

The import of this provision has been subject to interpretation in many cases, notably because, compliance of the procedural requirement laid down in this provision has attracted common mistakes by the trial court. The case of **Geofrey Wilson v Republic** (supra); **Hemedi Omary Ally @Dallah v Republic** (supra); **Eliah Bariki v Republic** (supra) and **Kimbute Otiniel v Republic** (supra) are among the relevant authorities which have been cited by the appellant, are among the authorities in which the application of the provision above was interrogated. Starting with **Godfrey Wilson vs Republic** (supra), prior to making its finding, the Court of Appeal provided a nuanced background of the current provision of section 127(2) and how it was ushered in the Evidence Act by The Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016). This law which came into force on 8/7/2016 deleted subsections (2) and (3) and introduced a new content to subsection (2). The Court held that:

> In our understanding, the above 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"

In a subsequent decision in **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (unreported), it stated thus:

> "From the plain meaning of the provision of sub-section (2) of S. 127 of the Evidence Act, which has been reproduced above, a child of tender age may give evidence after taking oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies.

Also, in **Masanja Makunga vs Republic**, Criminal Appeal 378 of 2018, while interrogating the consequences of the amendment, the Court held that:

> Consequent to the amendment, the requirement for the court to conduct voire dire examination so as to determine whether or not a child witness understands the nature of an oath or affirmation and whether he can give evidence on oath or affirmation in terms of the then subsection (2) of section 127 of EA was done away with. In its place, the requirement for the child of tender age to undertake the duty of telling the court nothing but the truth and not lies as a condition precedent before reception of his/her evidence was introduced (See **Geofrey Wilson vs Republic**, Criminal Appeal No. 168 of 2018 and **Yusuph Molo vs Republic**, Criminal Appeal No. 343 of 2017 (both unreported)

Undeniably, as PW2 was only 4 years old hence of a tender age, the reception of his evidence ought to strictly comply with the law stated above. But, when the authorities above are applied to the proceedings above reproduced, it follows that by conducting a *voire dire* test in a trial that took place in February 2020 almost four years after the *voire dire* test was scrapped from our statute books, the trial magistrate lucidly erred. What was required from him was to require the child to undertake to tell the truth and not lies and to record the undertaking so procured.

I now turn to the argument fronted by the Learned State Attorney that the requirement of the law was complied with as the questions asked by the trial court are akin to the simple questions stipulated in **Godfrey Wilson** (supra) and PW2 told the court that she can tell the truth. This court is live to the fact that the law as developed through precedent require that the undertaking to tell the truth and not lies must be preceded by a set of question-and-answer questions aimed at determining the competency of the child as competency cannot be assumed. Underlining this requirement in **Godfrey Wilson** (supra) the Court of Appeal Stated that, before requiring the child to make the undertaking the trial magistrate/judge can ask her/him simplified questions such as his age, the religion he/she professes and whether

he/she understands the nature of oath and thereafter, require her to make the undertaking. Also see **Issa Salum Nambaluka v. Republic,** Criminal Appeal No. 272 of 2018 (unreported); **Mbaraka Ramadhani @ Katundu Versus Republic**, Criminal Appeal No. 185/2018 CAT and **Jafari Majani vs Republic**, Criminal Appeal 402 of 2021, the Court of Appeal (unreported). In the latter case, the Court emphatically stated that:

> It is settled that in situations where a child witness is to give evidence without taking oath or making an affirmation, the child must first and foremost make a promise and undertake not to tell any lies. The promise to tell the truth and the undertaking not to tell any lies must be recorded. It should be emphasized that it is from the above circumstances that our decisions in Godfrey Wilson (supra) and Nambaluka (supra) in essence demand the competence of a child of tender age witness to be tested first, albeit in brief, before his evidence is received under S.127(2) of the Evidence Act. The provision enjoins trial courts when dealing with children of tender age as witnesses, to still conduct a test on such children to test their competence. It is unthinkable that S.127(2) of the Evidence Act can be blindly applied without first testing a child witness if he does not understand the nature of an oath and if he is capable of comprehending questions put to him and also if he gives rational answers to the questions put to him.

Undeniably, the question put out to the PW2 by the trial court are akin to the simple questions test required by the law. The learned State Attorney is implicitly inviting this court to turn a blind eye to the title "VOIRE DIRE TEST" and concentrate on the questions. I respectfully decline the invitation because much as the questions are akin to the simple questions developed in **Godfrey Wilson** (supra) and in subsequent authorities, there is no undertaking by the PW2 that he will tell the truth and not lies. The argument by the learned State Attorney would have hold water had, if after making the conclusion that the child was unable to give evidence under oath, the trial court went further to require the child to make the undertaking. The fact that it did not, has rendered the evidence of PW2 defective for being irregularly procured.

As correctly argued by Mr. Mshana, the anomaly is fatal and has rendered the evidence of PW2 devoid of any evidential value and liable for expungement from the record (**Masoud Mgosi vs Republic**, Criminal Appeal No. 195 of 2018, CAT and **Abdallah and Nguchika vs Republic**, Criminal Appeal No. 182 of 2018, CAT (all unreported).

Subsequent to this finding, I have asked myself whether upon disregarding the evidence of PW2, the remaining evidence is sufficient to

sustain the conviction. From the evidence on record, this question attracts a negative answer. I say so because, much as the evidence of PW1, PW3 and PW4 conjointly provide a probable account that PW2 was penetrated by a blunt object/raped; the only direct evidence linking to accussed to the incidence was the testimony of the accussed. All the remaining evidence on this aspect are hearsay and incapable of sustaining the conviction.

As this finding disposes of the appeal, I see no point to proceed to the remaining grounds of appeal. I will, consequently, stop here and allow the appeal based on this ground. The conviction and sentence of the trial court are quashed and set aside. It is further ordered that the appellant be set at liberty unless he is held for another lawful cause.

DATED at **DAR ES SALAAM** this 27th day of April 2022.

X

Signed by: J.L.MASABO

J.L. MASABO
JUDGE