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

CRIMINAL APPEAL NO. 102 OF 2019
(Originating from Criminal Case No. 250 of 2019)

NURDIN IBRAHIM KIRWANILA..... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

Last order: 8/04/2022
Judgment:13/04/2022

MASABO, J.:-

The District Court of Temeke convicted the appellant of incest by male contrary to section 158(1) (a) of the Penal Code [Cap 16 RE 2019] and sentenced him to 30 years imprisonment. It was alleged that, on the fateful date, 17th March,2019, at Sandala area within Temeke District in Dar es Salaam region, he carnally knew his daughter who was then 14 years old.

Displeased by the conviction and sentence, he is now before this court armed with nine grounds of appeal namely; *One*, the evidence of PW1 was wrongly recorded contrary section 127(2) of the Evidence Act [Cap 6 RE 2019]. *Two,* the conviction was solely based on PW1's incredible and uncorroborated evidence. *Three,* the court failed to analyse the

prosecution evidence as there is a possibility that PW1 and PW2 fabricated the case against him. *Four*, the conviction was erroneously based on PW2 evidence that he inspected the victim. *Five,* section 214 of the Criminal Procedure Act [Cap 20 RE 2019] was offended. *Six,* the conviction was based on unprofessional medical evidence of PW3 who failed to state whether the hymen was recently broken and whether the victim's vagina had bruises. Also, PW3 failed to distinguish between menstrual blood and blood from a vaginal injury and that his evidence failed to implicate the appellant. *Seven*, PW4, the investigator, who visited the crime scene did not find the radio which PW1 alleged that was at the scene. *Eight,* the prosecution failed to summons PW1's grandmother who was the first person to whom PW1 reported the incident. There was contradiction on the date when PW1 was examined and the date the appellant was arrested and that his defence evidence was not considered. *Nine,* the case against him was fabricated and not proved beyond reasonable doubt.

Hearing of the appeal proceeded in writing. The appellant was self-represented while Ms. Jacqueline Werema, learned State Attorney, appeared for the respondent, the Republic. Arguing in support of the 1st ground of appeal, the appellant argued the testimony of the victim

who testified as PW1 offended section 127(2) of the Evidence Act [Cap 6 RE 2019] as, before rendering her testimony she did not undertake to tell the truth. He proceeded that as the victim was 14 years, she ought to have promised to tell the truth but the proceedings do not clearly show whether she promised. Also, the undertaking to tell the truth and not lies ought to have been proceeded with questions to determine whether she understood the nature of the oath but it did not. In fortification he cited the case of Issa **Salum Nabaluka v R** Criminal Appeal No. 272 of 2018, CAT and **Godfrey Wilson v R** Criminal Appeal No, 168 of 2018, CAT. He then cited the case of **Joseph Damian @ Savel v R**, Criminal Appeal No. 294, CAT and **Kimbute Otiniel v R,** Criminal Appeal No. 300 of 2011, CAT (all unreported) and argued that since the evidence of the victim was offensive of the provision above, it should be expunged from the record. He argued further that if the evidence of this witness is discounted or expunged, there will be no evidence to sustain the conviction and sentence as the remaining evidence is all hearsay evidence as none of the witnesses was at the scene.

This ground of appeal was supported by the Ms. Jacqueline Werema, learned state Attorney. In her reply submission she submitted that the

respondent supports the appeal as the evidence of the victim who testified as PW1 was offensive of the provision of section 127 (2) of the Evidence Act. She argued that, this section permits the court to admit evidence of a child of tender age on oath or an undertaking to tell the truth. Moreover, she argued that, the oath/affirmation or the undertaking to tell the truth must be preceded by a simplified set of questions to meant to determine whether the witness understands the nature of the oath and the undertaking she/he is about to make. She proceeded that, in the present case such questions were not asked and it is not clear whether PW1 was sworn/affirmed or undertook to tell the truth.

From these submissions, the main question for determination is whether the evidence of the victim who testified as PW1 was irregularly procured as submitted by both parties. As a general principle, every witness must give his/her evidence under oath. The only exception is when the witness is a child of tender age, defined in law as a person whose apparent age is not above 14 years as per 127(4) of the Evidence Act. The exception is articulated under section 127(2) of the same Act which provides that, a child of tender age may give evidence on

oath/affirmation or upon an undertaking to tell the truth to the court and not to tell lies. It stipulates that:

> (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.

As per subsection 6 of section 127, in criminal proceedings involving sexual offence such as in the instant case, the evidence so procured is that of the victim, it suffices to ground a conviction if upon assessment of its credibility, the court is satisfied that the child witness before it is telling nothing but the truth. Much as the law is silent on the modality by which the oath or undertaking to tell the truth may be procured, the jurisprudence is now settled that, prior to administering the oath or requiring the child to make an undertaking to tell the truth, the presiding magistrate or judge must ask the child a set of simplified question as amplified by the Court of Appeal in **Godfrey Wilson v R** (supra) and in subsequent decisions of the Court in **Issa Salum Nambaluka v. Republic** (supra) and **Jafari Majani vs Republic**, Criminal Appeal 402 of 2019 (all unreported), among others.

In the present appeal, it is undisputed that the victim who testified as PW1 was 14 years when she appeared in court to render her testimony. By virtue, of section 127(4) she was a child of tender age and as per section 127(2) her evidence ought to have been procured on oath/affirmation or upon an undertaking to tell the truth and not to tell lies. The trial court proceedings, vividly shows that, as submitted by both parties, the testimony of PW1 did not abide with the provision of section 127(2) as it not clear whether her evidence was taken on oath/affirmation or upon making an undertaking to tell the truth.

According to these proceedings, before recording PW1's evidence, the trial magistrate asked PW1 a set of questions regarding her name, age, her occupation, name of the school and religion. Much as this was correct, the procedure that followed after these questions was lucidly wrong as it is not clear whether she was required to make the undertaking to tell the truth or was affirmed. For this reason, this court has found merit in the submissions rendered by both parties and joins hands with the appellant that the evidence of PW1 has become liable for expungement from the record and proceeds to expunge it.

Having expunged the evidence of PW1 and upon a thorough and critical assessment of the remaining evidenced which comprises the evidence of PW2, PW3, PW4 and Exhibit P1 (PF3), I am of a firm view that it is incapable of sustaining the conviction and sentence. As correctly argued by the appellant, the evidenced of PW2 who is PW1's maternal aunt is purely hearsay. Her narration is wholly based on the story she heard from PW1 and second-hand information from PW1's maternal grandmother who narrated to her what she heard from PW1. Similarly, PW4 was not at the scene and her testimony in court was all about what she heard from PW1.

The credibility of the medical examination report as presented by PW3 and as contained in Exhibit P1, is to say the least highly doubtful. As argued by the appellant, PW1 did not physically examine PW1. He just observed through his eyes that PW1 was bleeding and the hymen was not intact. Under the circumstances, I join hands with the appellant that the method and the finding attract serious doubts which must be resolved in the appellant's favor. It is to be noted further that, even if this testimony was deemed credible it would still be insufficient to sustain the conviction as it does not any how implicate the appellant.

In the foregoing, the appeal passes. The conviction and sentence of the trial court are quashed and set aside. The appellant shall forthwith be set at liberty unless he is otherwise lawfully held.

DATED at DAR ES SALAAM this 13th day of April 2022

4/14/2022

X

Signed by: J.L.MASABO

J.L. MASABO
JUDGE

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