IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 23 OF 2021

FRED CRISPIAN@ SANZE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the District Court of Kibaha at Kibaha in Criminal Case No.3 of 2021)

JUDGMENT

25th April & 31st May, 2022

KISANYA, J;

At the District Court of Kibaha, Fred Crispian @Sanze (the appellant) was charged with an offence of rape sourced under sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E.2019. He was convicted and sentenced to 30 years of imprisonment. It was stated in the particulars of the charge sheet that, between 3rd and 5th day of March 2021 at Soga area within Kibaha District in the Coast Region, the appellant had carnal knowledge of BC (also referred to as "the victim" to conceal her identity), a girl aged 10 years.

At the peak of the trial, the trial court found the appellant guilty and convicted him as charged. Accordingly, he was sentenced to serve thirty (30) years imprisonment.

A brief background of the matter went as follows; the victim is PW1's daughter. She and her friend (PW5) were schooling at Soga Primary School.

The victim who testified as PW2 was in standard four, whereas her friend (PW5) was in standard three. On 5th March, 2021 at 9:00 am, PW5's parents went to the victim's father (PW1). They informed PW1 that the victim and PW5 had been raped. On 08/3/2021 PW1 went to the victim's school. He observed that her attendance was poor. Two days later, on 10/03/2021, PW1 reported the matter to Mlandizi Police station where the victim stated to have been raped. She named uncle Fredi (the appellant) who happened to be a security guard to the school where PW1 was a teacher. Thereafter, PW2 was taken to Mlandizi Health Centre where she was examined by PW4 Esther Elisa. Her examination revealed that the victim was found with no hymen and bruises in her private parts.

In their respective testimonies, the victim and her friend (PW5) testified to have been raped by the appellant on 3rd March, 2021. In addition, PW5 told the trial court that the appellant had their canal knowledge against the order of nature. Another witness is PW3 WP 10677 DC Diana, a police officer who investigated the matter. The prosecution case was also supported by two exhibits to wit, birth certificate of the victim (Exhibit P1) and the Medical Examination Report of the victim- PF3 (Exhibit P2).

In his defence, the appellant testified that the allegation laid against him was plotted. He contended that the headmaster and deputy headmaster where he was a security guard wanted him out of the school. He urged that the trial

court to consider he did commit the offence. At the end of the trial, the appellant was found guilty, convicted and sentence as hinted earlier.

Dissatisfied with the conviction and sentence, the appellant has filed the present appeal on six grounds of appeal which can be summarised as follows:-

1. That, the trial court erred in law and fact by convicting the appellant without considering that the victim and her friend gave contradictory evidence.
2. That the trial court erred in law and fact to convict the appellant without considering that the investigator of the case was a liar and not reliable.
3. That the trial court erred in law and fact by believing improbable and implausible stories of PW2 and PW5 that on the fateful day the appellant raped and sodomised them.
4. That the trial court erred in law and fact to convict the appellant basing on the evidence of PW1.
5. That the trial court erred in law and fact to convict the appellant by failing to consider that the defence case raised reasonable doubt to the prosecution case.
6. That the trial court erred in law and fact by holding that the case was proved on the required standards.

At the instance of appellant, hearing of this appeal was conducted by way of written submissions.

In his submission in support of the appeal, the appellant raised an additional ground of appeal to the effect that the evidence of PW2 and PW5 was recorded in contravention of section 127(2) of the Evidence Act [Cap. 6, R.E. 2019]. He submitted that the record is silent on how the trial court arrived at a conclusion that PW2 and PW5 did not know the nature of oath and that they promised to tell the truth. Citing the cases of **Hassan Yusuph Ally vs Republic**, Criminal Appeal No.462 of 2019 and **Godfrey Wilson vs Republic**, Criminal Appeal No.168 of 2018, the appellant argued that the evidence of PW2 and PW5 should be disregarded for being taken in violation of section 127 (2) of the Evidence Act.

The appellant went on to submit in support of the grounds advanced in the petition of appeal. The first, second, third, fourth and sixth points were based on evidence of PW2 and PW5 which formed the basis of the trial court's decision. He submitted PW2 and PW5 are not credible witnesses on the account that they contradicted each other. The appellant pointed out the contradiction was in respect of crime scene whereby PW2 stated that it was at Makaburini while PW5 told the court that the crime scene was at the bush. It was also the appellant's contention that the charge sheet was at variance with evidence of PW2 and PW5. That contention was based on the fact that the charge shows that the offence was committed on 3/03/2021 and 05/03/2021, while the evidence shows that the offence was committed on 03/05/2021. In that regard, the appellant was of the view that PW2 and PW5 were not credible and reliable

witnesses to warrant his conviction. He also held the view that the prosecution did not prove its case beyond all reasonable doubts.

Submitting on the last ground of appeal, the appellant reiterated that the evidence of PW2 and PW5 were not corroborated. It was his argument that the rest of the prosecution's evidence was hearsay and that there was no eye witness who witnessed the incident thereby raising doubt on the prosecution's case. From the foregoing, the appellant submitted that the prosecution did not prove its case beyond all reasonable doubt.

In reply, Mr. Kato indicated that he was supporting the appeal basing on the additional ground of appeal. The learned State Attorney was in agreement with the appellant that the evidence of PW2 and PW5 was recorded in contravention of section 127(2) of the Evidence Act. He argued that the trial court is duty bound to ask the child if he or she understands the meaning of oath and that, in the event the child does not understand the meaning of an oath, the evidence is required to be taken after the child has promised to tell the truth and not lies. To buttress his argument, Mr. Kato cited the case of **Mkorongo James vs Republic**, Criminal Appeal No. 498 of 2020.

As regards the case at hand, Mr. Kato submitted that, the trial court did not satisfy itself whether the victim and PW5 understood the meaning of an oath prior to asking them to promise to tell the truth and not lies. Therefore, he implored me to expunge the evidence of the victim (PW2) and PW5. Further

to his submission, Mr. Kato submitted the remaining evidence should be put into scrutiny by this court to ascertain whether it is sufficient to uphold the conviction of the appellant.

Having dispassionately considered the submission of both parties and examined the record of this matter, this Court will now make a determination on the merit of this appeal.

Starting with the additional ground, it is common ground that PW2 and PW5 were children of tender age. Therefore, reception of their evidence is governed by section 127(2) of the Evidence Act which provides as follows: -

> *"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 rightly argued by the appellant and learned State Attorney, the above cited section coached in mandatory terms. It is trite law that before arriving at a finding that the evidence of child of tender age promise to tell the truth and not to tell lies, the trial court must first examine and test his competence and satisfy itself whether the said child understands the meaning of oath. This position has been stated in a number of cases including **Godfrey Wilson** (supra) where it was held that:-

> *"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 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 that stage. We think, the trial magistrate or judge can ask the witness of a tender age such a simplified questions…"

In another case of **John Mkorogo James** (supra), Court of Appeal cited with approval the case of **Godfrey Wilson** (supra) and when on underlining that:

"The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court tell the truth and not to tell lies. It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court tell the truth and not tell lies. It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the court tell the truth and not tell lies before they testify. This is the reason why any child of tender age who is brought before the court as a witness is required to be examined first, albeit in brief, to

know whether he/she understands the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the promise to the court tell the truth and not tell lies as per section 127 (2) of the Evidence Act"

Having gone through the record, I agree with the appellant and the learned State Attorney that the testimonies of PW2 and PW5 were not taken in accordance with the above cited provision of the law. The trial court did not conduct an inquiry to satisfy itself whether PW2 and PW5 understood the nature of oath so that they could give their evidence under oath. Also, PW2 was not asked the religion she professes.

It has been a settled position that evidence of child of tender age recorded in contravention of section 127(2) must be expunged. However, the position propounded by the Court of Appeal in the case of **Wambura Kisinga vs R**, Criminal Appeal No. 301 of 2018 (unreported) is to the effect that such evidence may not be expunged if it is clear from the assessment that the victim was credible and where the court records reasons that notwithstanding non-compliance with section 127(2), a person of tender age told the truth.

In that regard, I was inclined to consider the appellant's contention that, PW2 and PW5 were not credible witness. As indicated earlier, the appellant's argument is based on the reason that PW2 and PW5 contradicted each other. It is settled law that contradictions in evidence of one witness or among witnesses cannot be avoided in any particular case. However, contradiction which goes to the root of the matter has an effect on the credibility of the

witness. [See the case of **Mohamed Matula vs R**, [1995] T.L.R and **John Gilikola vs R**, Criminal Appeal No. 31 of 1999 (unreported)].

In the instant case, the material contradiction between PW2 and PW5 is on what the appellant did to them. PW2 testified that the appellant raped them while PW5 stated on oath that they were raped and sodomized. It is my considered view that the said contradiction goes to the root of the case thereby affecting the credibility of PW2 and PW5. For instance, if it is taken that the victim was sodomized, such evidence is at variance with the charge sheet thereby implying that the charge was not proved. For those reasons, I am inclined to expunge evidence of PW2 and PW5 from the record of the trial court proceedings.

Having expunged the said evidence, the next question is whether the remaining prosecution evidence is still watertight to sustain the appellant's conviction. It is clear that the remaining evidence of PW1, PW3 and PW4 is deficient to support the conviction laid against the appellant. In the case of **Jumanne O. Manoza vs Republic,** Criminal Appeal No.404 of 2019, the court when confronted with similar situation, the court observed 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 victim 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".*

From the basis of the foregoing analysis, I find no evidence to sustain the conviction and sentence meted against the appeal.

In the upshot, this appeal is found meritorious on the foresaid reasons. I, accordingly, proceed to allow the appeal, quash the conviction and set aside the sentence. It is further ordered that the appellant be released from prison unless he is confined there for other lawful cause.

DATED at DAR ES SALAAM this 31st day of May, 2022.

S.E. Kisanya
JUDGE
31/05/2022