HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO 44 OF 2022

BETWEEN

JACOB RAPHAEL ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Criminal Case No 82 of 2021 of the District Court of Kinondoni, Dar es Salaam D.D. Mlashani, RM)

JUDGMENT

Date of Last order 22/09/2022

Date of Judgment 04/10/2022

BADE, J.

The appellant Jacob Raphael was arraigned before the District Court of Kinondoni charged with rape contrary to sections 130(2) (e) and 131(3) of the Penal Code Cap 16 RE 2019.

The allegations against the appellant can be gleaned from the particulars of the offence thus on 11th day of May 2021 at Mbezi Juu within the District of Kinondoni in Dar es Salaam, the appellant had carnal knowledge of one 'FY' (whose identity is hidden for her protection); a six years old girl. The Appellant pleaded not guilty; and the prosecution had summoned five

witnesses to make out their case. The defense was solely based on the Appellant alone.

At the end of the trial, the Appellant was convicted as charged of Rape contrary to Ss 130(2) (e) and 131(3) of the Penal Code Cap 16 RE 2019; and was sentenced accordingly to a term of life imprisonment. The Appellant is aggrieved with this conviction and sentencing and therefore preferred this appeal. He had filed 11 grounds of appeal for this Court's consideration and determination.

At the hearing of the appeal, the Appellant had the services of Mr. Geoffrey Luyanji, learned advocate, while the Republic was ably represented by Ms Nura Manja, State Attorney. At the outset of the hearing Mr. Luyanji proposed to consolidate the grounds of appeal so that he could argue ground 2 and 3 together, abandon ground 4 altogether, ground 6, 7 and 8 together, ground 9, 10 and 11 together and ground 1 and 5 in seriatim.

The evidence which was laid in the scales demonstrated, I think, the following facts. On 11th May 2021 the appellant was a security guard at the place of work where the victim (PW1) had been with his father (PW2) and his younger child, where they were being minded while the father worked and the mother had been out in her petty business and running errands. The Appellant had asked the child to bring him water to drink and as the child obliged, he found the opportunity to commit the alleged violation, where he pulled her hand and took the child into his lap, undressed her pants and put his "mdudu" in her private parts which she uses to urinate. She shouted a sudden cry that made the father to come to the scene, only to

find she was released by the Appellant but still crying. Upon being interrogated by the father as to why she was crying, she explained that her younger brother, who was at the scene but fast asleep, bit her. So the father took it upon himself to console the child to stop crying and went back to his work.

Meanwhile the mother came back, and she told the mother that she was unwell, so they all went home and upon arriving home and on further probing, they found her underwear to have blood stains and bleeding from her vagina. At this point she told her mother that she was violated by the security guard earlier during the day when they were at the father's place of work, but could not tell her father because the Appellant had threatened to beat her up if she retell this incidence. They took her to the hospital medical examination the next day, while the Appellant was arrested.

The grounds of appeal are reproduced here for ease of reference the way they are argued thus:

1. (Originally ground 5) That PW1's evidence was rather vague and more so, as per her age of 6 years old her evidence had wrongly been admitted in court.
2. (Originally ground 1) That the trial magistrate erred in law and facts for finding the appellant guilty and convicting him for the offence of rape while the testimony of PW3 and the medical report PF3 are self explanatory that the victim was not raped by the appellant than suggesting that there is something different from the penis of the appellant penetrated (sic) to the victim's vagina not by the appellant.

3. (Originally ground 2 and 3) that the trial magistrate erred in law and fact that the younger brother of the victim was mentioned but was not charged or called as a witness to dispute that fact which rise (sic) a reasonable doubt that the responsible person was the named victim's young brother; and that the victim did not name the appellant at the earliest opportunity; and no earliest medical examination results were done indicating the appellant indeed had raped the victim.
4. (Originally grounds 6, 7 and 8) that trial magistrate erred in law and fact for convicting the appellant of the charges of rape while the evidence of PW1 and PW2 had not proved beyond reasonable doubt that the victim was raped by the appellant; and there being no proof that the victim and the appellant over the alleged rape(sic); and without analyzing and weighing the testimony of the evidence (sic) side;
5. (Originally grounds 9,10 and 11) that the trial magistrate erred in law and fact for finding the appellant guilty of the offence and convicting him while he himself was not sure in his analysis and findings over the raised issues; while the whole of the testimony of the prosecution side was weak and self-contradictory; and that the prosecution case was not proved beyond the reasonable doubt.

Submitting in support of the appeal, the learned advocate for the appellant argued on the 5th ground of appeal that the Court erred in fact and law in taking PW1's evidence without considering S. 127(2) of Tanzania Evidence Act Cap 6 RE 2022 where the law requires to receive a child of tender age's evidence, it should ascertain if the child was able to understand the nature

of oath requirements and weigh how competent they are to understand the nature of his testimony, before promising to tell truth and not lies.

On the contrary, the trial Court took the PW1 testimony who was a Child without ascertaining if the witness is competent and understands the circumstances of the case. He chimes that the Court jumped to concluding that PW1 will not tell lies without testing her competence; and failure to do so is fatal as it contravenes the law. In page 7 of the proceedings the court records that since the Child is a minor, the court has asked her if she promises to tell the truth and she replies that she promised the court to tell the truth, not lies but only truth. That clearly there was no competence test done.

Finding support through the Court of Appeal decision, he maintains that the trial magistrate ought to have established that the child is competent before getting the promise to tell truth and not to lie.

See John Mkorongo James V.R Criminal Appeal 498/2020 CAT and **Robert Kalibara vs Republic Criminal Appeal No. 38/2020** where it was stated that when the guiltiness or otherwise of an accused person is at issue, S 3(2) of TANZANIA EVIDENCE ACT RE 2019 emphasizes that the Prosecution has to satisfy beyond reasonable doubt that a fact exist.

In response to this ground, the respondents countered that that they conceded to the fact that PW1 is a child of tender age, but hastened to add that S 127(6) of the TANZANIA EVIDENCE ACT Cap 6 RE 2022 and the Case of **Wambura Kiginga V. R Criminal Appeal no 301/298 CAT at MZA** (unreported) is clear on the position of the law that conviction can be based

solely on independent testimony of the victim of the sexual offence or a child of tender age if the court is satisfied on the credibility of the evidence of the child of tender years on its own merits, notwithstanding that such evidence may not have been corroborated, if for reasons recorded in the proceedings, the court is satisfied that the child of tender age or victim of sexual offence is telling nothing but the truth.

She is further convinced that the **Mkorongo's case** cited earlier on is distinguishable because the child in that case did not promise to tell the truth. This child categorically did promise to tell the truth and thus the Court is fortified on its conviction.

Since this 5th ground of appeal seem to be central to the instant appeal, I find it pertinent to address the same first. Admittedly as per the record of the proceedings, the trial court did not test the competence of the victim of the sexual offence before receiving her promise to tell the truth and not lies. In the Court's mind then, the issue for determination against this ground of appeal is whether non-compliance with the requirement of Section 127(2) of the Tanzania Evidence Act Cap 6 of the RE 2019 fatal? And if the answer is in the affirmative, what will be the probative value of the non-compliant testimony. For ease of the foregoing analysis the record of the proceedings for the case at the trial stage is hereby so reproduced as such:

PW1: FY (I withhold the name of PW1 so as to conceal the victim's identity), 6 yrs old

Jogoo – Mbezi

Student of Standard one at Lugalo P/School

Court: Since the child is a minor, the court has asked her if she promises to tell the truth and she reply as follows:

PW1 Reply: "I promise to tell Court the truth, not lies but only the truth"

Court: Section 127(2) of TEA Cap R.E 2019 is C/W

From the scrutiny of the said record it is clear that the trial magistrate was inclined to use S127(2) of Tanzania Evidence Act Cap 6 R.E 2019 to admit the evidence of PW1. She actually made a record indicating that section 127(2) is complied with. This section as interpreted by the Court of Appeal of Tanzania through the **Mkorongo's case supra** which quoted with approval the case of **Godfrey Wilson v. Republic, Criminal Appeal no 168 of 2018** (unreported) necessarily requires the trial court

"…. To require PW1 *(the child witness)* to promise whether or not she would tell the truth and not lies. We say so because, section 127(2) as amended imperatively require a child of 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 child of 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 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 profess and whether he/she understands the nature of oath
3. Whether or not the child promises to tell the truth and not tell lies. Thereafter, upon making the promise, such promises must be recorded before the evidence is taken.

This has also been the position in the case of **Issa Salum Nambaluka v. Republic, Criminal Appeal no 272 of 2018 (unreported).** Further in the case of **Jafari Majani v. Republic, Criminal Appeal no 402 of 2021 (unreported)** where the Court stressed on the import of section 127(2) of the Tanzania Evidence Act by stating 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 decision in Godfrey Wilson and Nambaluka's case 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 section 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 S127(2) of the Tanzania Evidence Act can be blindly applied without first testing a child witness if he does 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*"

On the light of these authorities I do not think Ms Manja the State Attorney for the respondent is right in saying it is not exactly required by law for a child witness of tender age to firstly be examined so as to test their competence and know whether he/she understands the meaning and nature of an oath before they are required to testify on the promise to the court to tell the truth and not tell lies. I am convinced, as amply demonstrated by the Court of Appeal in many instances that the section does require a simple test be conducted to test the child witness competence, before it is concluded and recorded their promise to tell the truth and not to lie. This has been the position in **Salum Nambaluka v Republic, Criminal Appeal no 272 of 2018** as well as **Jafari Majani v Republic, Criminal Appeal no 402 of 2019 (all unreported)** as quoted above.

As per Mr Justice Mwampashi in the **Mkorongo's case** supra, this is so because it can not 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 to tell the truth and not tell lies…. There are also children of tender age who very well understand the meaning and nature of an oath and thus require to be sworn and not just promise to the court to tell the truth and not tell lies before they testify too.

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 to establish if they do understand the meaning and nature of an oath and thus they will sworn or affirmed; and /or that their evidence will be taken on the promise to court to tell the truth and not lies.

On another note, I am settled in the view that the trial magistrate was not, in his mind, by all intent and purpose, inclined to be guided by the provisions of S127(6) of the Tanzania Evidence Act Cap 6 R.E 2019. In any case, the Court of Appeal in **the Wambura Kiginga's case supra** set out some important conditions to be observed, and the same they emphasized, **must be observed to the letter.** (The emphasis is mine) This, I respectfully think, the trial magistrate did not direct his mind to, looking into the record of the proceedings. These conditions are; **first**, that there must be a clear assessment of the victim's credibility on record and; **second**, the court must record reasons that notwithstanding non-compliance with section 127(2), a person of tender age still told the truth. Here it is also clear I think, that there is not an option for the trial court to simply choose not to comply with the provisions of section 127(2) in preference to section 127(6). I am minded to respectfully probe at which juncture is the trial court indulged with the option to actually imploy section 127(6) during the conduct of the trial because as demonstrated by the reasoning of the Court of Appeal above, invocation of section 127(6) requires compliance with some conditions to the letter.

So, while convicting a culprit of sexual offence without complying to Section 127(2) based on a child of tender age witness basing solely on their independent evidence is not impossible, I have no doubt that the conditions precedent for such conviction were not met by the trial court on the present case. The Court of Appeal on insistence of meeting the conditions set for invoking Section 127(6), warn to always be cautious, rare and only in exceptional circumstances. While the Court in the **Wambura Kiginga's**

case demonstrated the reasons as to why it was inclined to allow, on appeal, the previous admission of the child witness testimony under section 127(6), which would otherwise be fatally defective, the trial magistrate under the present case was not bothered to record his reasons for admitting such testimony anyhow, not to mention that he intently guided himself, and rightly so I would say, to admit the evidence of the child witness under section 127(2) of Tanzania Evidence Act Cap 6 RE 2022, except without following the mandatory required procedure to establish the child competence.

For the reasons stated, the answer to the issue on whether non-compliance with section 127(2) of Tanzania Evidence Act Cap 6 RE 2022 is fatal is answered to the affirmative, and thus I allow this ground of appeal. This brings us to the question of the probative value of the testimony of PW1.

The position of the Court on this matter is settled that failing to conduct a brief examination to establish the competence of child witness of a tender age to test their competence **before** arriving to the conclusion that they promise to tell the Court the truth and not lies or and establish whether or not they understand the nature and meaning of an oath is fatal and renders the evidence valueless. In the case of **Faraji Said v Republic, Criminal Appeal no 172 of 2018 (unreported)** the Court of Appeal stated:

> "To us, like the appellant and the learned State Attorney, the questions asked by the trial magistrate did not satisfy the requirement of section 127(2) of Tanzania Evidence Act . This was a violation of a settled principle under section 127(2) of the Evidence Act which justify for our interference of the concurrent findings of the two courts below. We

therefore fully concur with the submission made by Mr. Kalinga that the evidence of PW1 does not have evidential value, it ought, and we hereby do, expunge that evidence from the record"

This is the same effect as resulting from the recording of the instant case where the admission of the evidence of the child witness did not comply with the requirement of the provisions of the law stated above. This evidence can not be sustained and thus it is expunged from the record.

What follows now is the question whether the remaining evidence still hold any probative value and can sustain and support the appellants conviction. Understandably, all the remaining evidence becomes worthless because the holding evidence which is the evidence of the victim of the alleged offence has crumbled.

I tend to agree with the learned counsel for the appellant that the reaming evidence becomes hearsay and is not incriminating the appellant anymore since there is no sexual offence victim evidence on record, this is without going to any further analysis of the other evidence such as that of PW2 who testified to seeing his child crying and nothing more, or the PW3 evidence with its exhibit P2, which does not prove that the appellant was the person who penetrated the victim, and thus not connecting the appellant to the offence despite the fact that the victim was found with some bruises on her vagina and bleeding, while PW4 and PW5 were the militiaman and a police investigation officer respectively, whose evidence only related to arresting the appellant. None of these saw the appellant committing the offence.

These findings are enough to dispose this appeal without having to go through all the other grounds of appeal. The rest of the grounds of appeal are let to falter naturally. In the final analysis, I allow the appeal, quash the conviction and set aside the sentence on the appellant. The appellant Jacob Raphael is set free unless he is otherwise lawfully held. It is so ordered.

Dated at Dar es Salaam this 29th day of September 2022

A. Z. Bade
Judge
29/09/22

Court: Judgment delivered in the presence of the Appellant, and the learned State Attorney. Right of Appeal explained to parties.

10/4/2022

X

A. Z. Bade
JUDGE
Signed by: Aisha Bade