IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 18 OF 2022

(Originating from Criminal Case No. 292 of 2021 in the

District Court of Mkuranga at Mkuranga)

JUMA S/O STEVEN @DETOA...APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

JUDGMENT

Date of Last Order: 28/09/2022

Date of Judgment: 05/10/2022

Kamana, J:

In the District Court of Mkuranga (hereinafter 'the trial Court'), Juma Steven @Detoa, the Appellant, stood charged with the offence of Rape contrary to section 130(1), (2)(e) and 131(1) of the Penal Code, Cap.16 [RE.2002]. The particulars of the offence stated that on 14th November, 2019 at Kisemvule Mpera Village within Mkuranga District, Coast Region, the Appellant did have a carnal knowledge of ALP (name is withheld to conceal her identity) a girl aged 14 years.

During the trial, the Appellant denied the charges leveled against him. After hearing the evidence adduced by both sides, the trial Court

convicted the Appellant of the offence of rape and sentenced him to serve thirty years in prison. Aggrieved by such conviction and sentence, the Appellant preferred this appeal on self-made grounds as follows:

1. That the trial Magistrate erred in law and fact by convicting him basing on the evidence of PW1 a child of tender age without complying with section 127(2) of the Tanzania Evidence Act, Cap.6.
2. That the trial Magistrate erred in law and fact by convicting him relying solely on the unreliable evidence of PW1, a single witness without being corroborated by expert opinion.
3. That the trial Magistrate erred in law and fact by convicting the Appellant on the unreliable and incredible evidence of PW1 without being corroborated by the house girl (Dada Amania).
4. That the trial Magistrate erred in law and fact by convicting him relying on the discredited evidence of PW1, PW2 and PW3 which failed to link him with the offence.
5. That the trial Magistrate erred in law and fact by convicting him basing on the discredited evidence of visual identification of PW1.
6. That the trial Magistrate erred in law and fact by convicting him without addressing him properly in terms of section 231(1)(a) of the Criminal Procedure Act, Cap.20 [RE.2002].

Before the hearing of this Appeal, the Appellant filed additional grounds of appeal as follows:

1. That the trial Magistrate erred in law and facts by holding that the evidence of PW1 was cogent and credible without considered that her evidence was highly suspicious, contradictory and inconsistent.
2. That the trial Magistrate erred in law by convicting the Appellant without abiding by the procedure contrary to section 210(3) of the Criminal Procedure Act, Cap.20 [RE.2002].
3. That the trial Magistrate erred in law and fact to convict the Appellant basing on evidence of the Prosecution which failed to prove the offence beyond reasonable doubt.

Basing on the above grounds, the Appellant prays that the appeal be allowed and he be set at liberty. At the hearing of the appeal, the Appellant appeared without legal representation whilst the Respondent had the services of Ms. Sopha Bimbiga, learned State Attorney.

At this juncture, I think it is pertinent to succinctly provide facts that led to this Appeal. It was alleged by the Prosecution that on 14th November, 2019 in night hours at Kisemvule Mpera Village within Mkuranga, Coast Region, ALP (PW1) aged fourteen years was sound asleep in her family's house when the Appellant entered in her bedroom. While in the bedroom, the Appellant threatened PW1 not to scream for help. Being threatened and remained still, the Appellant undressed her and himself and inserted his phallus into PW1's vagina. She experienced pains but

she could not cry loudly as she was already threatened to be killed by the Appellant if she would raise an alarm.

After the incident, she found whitish fluid in her vagina as well as on bedsheet. She then decided to have a shower and wash all clothes. Despite the Appellant's threats, early in the morning she reported the matter to the house girl who told her not to relate the incident to her mother (PW2). However, immediately after the arrival of PW2 from town, PW1 informed her mother what happened to her last night and forthwith PW2 reported the matter to the police and PW1 was taken to hospital for medical investigation.

Testifying before the trial Court, PW2 evidenced that on 15th November, 2019 when she came back from town, her daughter PW1 told her about the incident. She testified that the Appellant was her house boy and had eighteen months in service. She told the trial Court that, after being informed of the incident, she reported it to police where they were issued with PF3.

Agnes Temba PW3, the Medical Officer at Mkuranga District Hospital testified that on 15th November, 2019 around 2014 hrs while at her work place, she attended PW1. After conducting physical and laboratory examinations, she found sperms in PW1's vagina which was seemed to have been penetrated. Thereafter, she filled PF3 and prescribe medication.

Defending himself, the Appellant testified that on 14th November, 2019 he returned home around 1700 hrs from somewhere where he went to look for a job since there was a misunderstanding with his employer (PW2). Being at home, he had a dinner together with members of the family and retired to bed. In the morning of 15th November,2019 he asked PW2 to pay him his salary but the latter was harsh so he decided to leave. He went to the village office to process National Identity Card. Thereat, a militiaman came, arrested and took him to Mkuranga Police Station. At that Station, he was locked up for some days before arraigned in the trial Court charged with an offence of rape. The Appellant testified that he did not rape PW1 but he has been framed by PW2 on account of his salary claims.

At the hearing of this appeal, the Appellant submitted his written submission in support of his grounds of appeal. The Respondent on the other hand was not in support of the appeal and the learned State Attorney vehemently argued in opposition. However, for the purpose of this judgment, I will not depict the arguments of both parties save for the first ground which in essence determines this appeal.

Submitting on the first ground, the Appellant contended that the trial Magistrate did not comply with the provisions of section 127(2) of the Tanzania Evidence Act with regard to the evidence of PW1. He submitted that since PW1 was a child of tender age, provisions of section 127 (2) of the Act requires the Magistrate to test the competence of the witness with a view to ascertaining whether she understands the meaning and nature of an oath. It was his submission

that the trial Magistrate concluded that PW1 has promised to tell the truth without testing her competence.

In view of that, the Appellant averred that such failure of the trial Court to comply with the provisions of section 127(2) rendered the evidence of PW1 valueless in the eyes of the law. To buttress his position, the Appellant referred this Court to the cases of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 and **Faraji Said v. Republic**, Criminal Appeal No. 172 of 2018.

Responding, the learned State Attorney contended that according to page 7 of the proceedings, PW1 promised the Court to tell the truth and that she is not willing to commit a sin for not telling the truth. She referred this Court to the decision of the Court of Appeal in the case **Wambura Kiginga v. Republic**, Criminal Appeal No. 301 of 2018. It was her submission that the Court of Appeal in the cited case observed that justice needs to be done in favour of children of tender age who while giving evidence suggest they tell the truth and not lies even if they have not sworn or affirmed in compliance with section 127(2) of the Tanzania Evidence Act. She further contended that in the **Wambura Kiginga's** case the Court of Appeal discussed section 127(6) of the Act and observed that a court can receive evidence of the child if it considers that the child is telling the truth and not otherwise. In concluding, the learned State Attorney was strongly of the position that PW1 testified truthfully and this Court should consider that.

Having considered the rival arguments of both parties, the issue for my determination is whether the evidence of PW1 was legally taken within the purview of section 127(2) of the Tanzania Evidence Act, Cap.6. section 127(2) of the Act provides the following:

> *'(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.'*

It is quite clear that the provisions of section 127(2) do not make it mandatory for a child of tender age to testify after taking an oath or making an affirmation. However, if the Court is of the view that a child of tender age can not give evidence on oath or affirmation, that Court must ensure that such child promises to tell the truth and not lies. In essence, the provisions of section 127(2) do not condone receiving of evidence of the child of tender age who has not promised to tell the truth and not otherwise.

In page 7 and 8 of the proceedings, the trial Magistrate recorded the following:

> *'Court: The witness is a witness of tender age. Hence with effect of section 127 of TEA as amended by*

S.26 of Act No. 2/2016 she is required to promise the court that she will tell the truth. I will therefore put some question to her so that she can promise to tell the truth.

QN: Do you know the meaning of telling the truth.

ANS: Yes, I know that to tell lie is a sin. Hence, I promise this court that I will tell the truth so that I do not to (sic) commit sin.

Court: The witness has promised to tell the truth hence I will receive her testimony with no oath.

From the above excerpt, I am of the settled mind that is not the promise envisaged by the provisions of section 127(2) of the Act. It is trite law that the Court before concluding that the child of tender age is telling the truth and not lies, that Court must explicate how it reached to that conclusion.

What the trial Court did was to ask a question with a view to soliciting promise to tell the truth from PW1 instead of asking questions for purposes of ascertaining whether PW1 understands the meaning of telling the truth before reaching the conclusion that she can testify

within the purview of section 127(2). In the case of **Godfrey Wilson (Supra)**, the Court of Appeal stressed on the importance of showing how the Court reached to the conclusion that a child of tender age has promised to tell the truth and not otherwise. In that case, the Court of Appeal observed:

> *'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 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." (Emphasis added).

When referring this Court to the decision of the Court of Appeal in **Wambura Kiginga's case (Supra)**, the learned State Attorney was trying to save the boat from capsizing. It is true that section 127(6) supersedes section 127(2) since it provides:

> *"(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict,* ***if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth****."*

Principally, section 127(6) put in place a mechanism of receiving and treating the evidence of the child of tender age or victim of sexual offences by closing the eyes to other preceding subsections of section 127 including subsection (2) subject to conditions. According to that section, the conditions precedent before reception of the evidence under the section 127(6) are to the effect that the trial Court must record in the proceedings reasons as to its satisfaction that the child of tender years or the victim of the sexual offence is telling nothing but the truth.

In **Wambura Kiginga's case**, the Court of Appeal observed the following:

> *"Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The conditions are;* ***first, that there must be clear assessment of the victim's credibility on record and; second, the court must record reasons that notwithstanding noncompliance with***

section 127(2), a person of tender age still told the truth*." (Emphasis added).*

In view of the decision of the Court of Appeal in **Wambura Kiginga's case**, for section 127(6) to be applicable, the trial Court must record reasons that precipitated it to believe that a person of tender age is telling nothing other than the truth. Besides, the trial Court must record its assessment in relation to the credibility of the witness of the tender age.

Neither reasons that PW1 is telling the truth nor assessment of her credibility were recorded by the trial Court. In the absence of such records, section 127(6) is inapplicable in the given circumstances. In that case, the argument raised by the learned State Attorney with regard to section 127(6) fails.

Since the trial Court failed to record evidence of PW1 in line with the provisions of section 127(2) of Tanzania Evidence Act, I expunge from the records the evidence of PW1. The next question for determination is whether there is other evidence to support the Prosecution case against the Appellant. I find none as there was no witness who testified to have seen the Appellant committing the offence and further circumstantial evidence to prove the commission of the offence is lacking.

Since the Appellant was convicted basing on the evidence of PW1 which has been expunged from the records, the remaining Prosecution's evidence is incapable to prove the offence of rape against the Appellant beyond reasonable doubt.

In that case, the appeal is allowed. The conviction is therefore quashed and his sentence set aside. I order that the Appellant be set free unless otherwise lawfully held.

It is so ordered.

Right to appeal explained.

DATED at **DAR ES SALAAM** this 5rd day of October, 2022.

KS KAMANA

JUDGE

Delivered at Dar es Salaam in Chambers this 5rd day of October, 2022 in the presence of both parties.