IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO.250 OF 2021

(Originating from Criminal Case No. 4 of 2021 in the District Court of Kigamboni at Kigamboni)

JUMA MOHAMED MSAKARA..... .....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 Kigamboni, Juma Mohamed Msakara, the Appellant, was arraigned charged with an Unnatural Offence contrary to section 154(1) (a) and (2) of the Penal Code, Cap. 16 [RE.2019]. It was alleged that on diverse dates between 10th and 12th days of December, 2020 at Kibada area within Kigamboni District in Dar es Salaam Region, the Appellant did have a carnal knowledge of one DX, a girl of seven years old against the order of nature.

The Appellant pleaded not guilty and in due course the full trial was held. The Prosecution led by Ms. Mbwana, learned State Attorney fielded five witnesses to prove its case. On the other hand, the Defence was represented by Mr. Akiza Rugemalira, learned Counsel. For the purpose of this Judgment, I will not delve into the evidence adduced by witnesses but it suffices to not that the Appellant was found guilty of the

offence with which he was charged and consequently imprisoned for a life.

Dissatisfied with the conviction and sentence meted out against him, the Appellant filed this appeal. In support of his appeal, the Appellant has eight grounds. However, for the purpose of this Judgment I will consider the sixth ground which in essence determines the merits of the appeal.

At the hearing, the Appellant was again represented by Mr. Rugemalira, learned Counsel and on the opposite side was Ms. Dhamiri Masinde, learned State Attorney.

As I pointed out, the focus of this Judgment will be on the sixth ground of appeal in which the Appellant contended that the trial Magistrate convicted him without conducting voire dire test of DX (PW1). Submitting on this ground, Mr. Rugemalira, learned Counsel told the Court that the provisions of section 127(2) of the Tanzania Evidence Act, Cap.6 were not observed by the trial Court in hearing the evidence of the PW1 who was a child of tender age. He accentuated that before recording the evidence of PW1 the trial Court did not direct itself towards ensuring that the witness promises to tell the truth and not otherwise.

The learned Counsel referred this Court to its decision in the case of **Abdallah Rashid Bakari v. Republic**, Criminal Appeal No. 33 of 2021. According to him, that case emphasized that before taking the testimony of the child of tender age, the trial Court is required to ask the child questions so as to test if the witness understands the nature of telling the truth. He submitted that, in the case at hand, the trial Court did not ask PW1 any question so as to be satisfied that the child knows the

meaning of telling the truth. To buttress his position, the learned Counsel referred this Court to page 7 of the Proceedings of the trial Court which does not indicate that the Court recorded its finding that the child has sufficient intelligence to tell the truth. In summing up, he prayed this Court to quash the conviction and set aside the sentence against the Appellant.

Responding, Ms. Dhamiri Masinde, learned State Attorney submitted that the requirement that voire dire should be conducted is no longer in existence. She contended that what is required now is for the child to speak the truth. She was of the firm view that PW1 promised to tell the truth and not to tell lies. She prayed the Court to reject that ground for lack of merit.

Rejoining, Mr. Rugemalira, learned Counsel conceded that it is true that voire dire is no longer applicable after the amendment of section 127(2) of the Tanzania Evidence Act, Cap.6. However, he contended that as rightly put by the learned State Attorney, the trial Court must, before taking the evidence of the child of tender age, satisfy itself that the child has promised to tell the truth and not otherwise. He reiterated the position enunciated in the case of **Abdallah Rashid Bakari (Supra)**.

At the outset, I agree with both learned Counsel that in the wake of the amendment of section 127(2) of the Tanzania Evidence Act in 2016 the requirement of the trial Court to conduct voire dire is no longer in existence. What is required now is the Court to lead the child of tender age to promise to tell the court the truth and not lies. In the case of **Shabani Gervas v. Republic**, Criminal Appeal No. 457 of 2019, the Court of Appeal observed the following:

> *'The appellant is correct that through the written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016) which came into force on 8/7/2016, section 127 of the Evidence Act was amended to do away with voire dire examination.* ***All a trial magistrate needs to do now is to cause a witness of tender age to promise to tell the truth and not lies****.' (Emphasis added).*

At this point, the issue for my determination is whether the provisions of section 127(2) of the Tanzania Evidence Act were complied with by the trial Court before recording the evidence of PW1. I think it is high time I reproduced section 127 (2) as I do hereunder:

> *'(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.'*

From the extract above, it clear that it is mandatory for a child of tender age to promise to tell the truth to the court and not otherwise unless such child gives evidence on oath or affirmation or in circumstances envisaged in section 127(6) of the Tanzania Evidence Act which in essence requires the trial Court to record in the proceedings reasons that precipitated it to believe that the witness is telling the truth and not otherwise.

From the records, the trial Court before PW1 adducing her evidence recorded the following:

'Court: The child understands the duty of telling truth and possessed of sufficient intelligence.

***PW1, DX, 8 YRS**; promise to tell truth to the court and not to tell lies and states:*

The records as shown do not depict the promise to tell the truth envisaged by section 127(2) of the Act. What is seen there is a conclusion of the trial Magistrate that PW1 understands the duty of telling truth and her sufficient intelligence. The trial Court did not record how it reached to that conclusion that PW1 is capable of telling the truth.

In the case of **Godfrey Wilson Versus the Republic,** Criminal Appeal No.168 of 2018, the Court of Appeal stresses on the importance of elucidating how the trial Court arrives at the conclusion that the child is understands the nature of truth and the duty to speak truth. The Court observed that:

'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).

In that case, the Court of Appeal was of the position that the evidence taken in contravention of section 127(2) is valueless and worthy no consideration. It stated:

'In this case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied with before taking the evidence of the victim. In the absence of promise by PW1, we think that her evidence was not properly admitted in

terms of section 127(2) of the Evidence Act as amended by Act No 4 of 2016.'

Since from the records and in consideration of section 127(2) of the Act and the cited cases, I am persuaded to hold that the evidence of PW1 was valueless in the eyes of the law and was not supposed to be used in convicting the Appellant. In that case, I expunge that evidence from the records of the trial Court.

The next question for determination is whether there is other evidence to support the Prosecution's 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 unnatural offence 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 5th day of October, 2022.

KS KAMANA

JUDGE

This Judgment delivered this 5th day of October, 2022 in the presence of the Appellant in person and learned Counsel for both Parties.