IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO.269 OF 2020

(Originating from Criminal Case No. 433 of 2019 in the District Court of Kinondoni at Kinondoni)

PAULO JOHN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 30/09/2022

Date of Judgment: 07/10/2022

KAMANA, J:

Paulo John who is now the Appellant was arraigned before the District Court of Kinondoni charged with an offence of grave sexual abuse contrary to section 138C(1)(a) and (2)(b) of the Penal Code, Cap.16 [RE.2002]. It was alleged that on 25th March, 2019 at Tegeta Nyuki within Kinondoni District, the Appellant for sexual gratification inserted his fingers in the vagina of MK (name withheld to conceal her identity), a girl of 7 years old.

The accused denied the charges. In view of that the Prosecution paraded five witnesses and tendered one exhibit. On the other side, the Defence had one witness who was the Appellant himself. After the hearing, the Appellant was found guilty and consequently sentenced to imprisonment for a term of twenty five years and to pay a fine of Tshs.1,000,000/-.

Aggrieved by such conviction and sentence, the Appellant filed this appeal in which he advanced four grounds of appeal which are condensed to three grounds as follows:

1. That, the learned Magistrate erred in law by convicting the Appellant basing on the evidence of PW2 which was taken in contravention of section 127(2) of the Evidence Act, Cap. 6.
2. That, the learned Magistrate erred in law by convicting the Appellant basing on contradictory evidence of PW1, PW2, PW3, PW4 and PW5.
3. That, the trial Magistrate erred in law and fact for convicting the Appellant without his case be proved beyond reasonable doubt.

At this point, I think I should provide a background that led to this appeal, albeit, lucidly. On 25th March, 2019 the Appellant was alleged to have inserted his fingers into PW2's vagina. The scene of crime was in Tegeta Nyuki House, Tegeta within Kinondoni District, Dar es Salaam. PW1 who is the mother of PW2 received an information from Success Elia Shauri (PW5) that one Jabir Shabani had seen the Appellant closing his zip and PW2 putting on her pant in the toilet.

In receipt of that information, PW1 queried her daughter PW2 with a view to ascertaining what she was doing with the Appellant. PW2 told her mother that Paulo who happened to be a watchman in Tegeta Nyuki House inserted his fingers into her vagina and has threatened to cut her with a knife if she divulges the issue to anyone.

On 26th March, 2019, PW1 reported the matter to Tegeta Police Station and thereafter at Mbweni Police Station where she was issued with PF3 for medical examination. She and her daughter went to Bunju A Hospital where the latter was examined by the Clinical Officer.

After medical examination, Yulia Mtoi, the Clinical Officer and PW4 found that PW2's vagina was open and one finger could pass through which he noted to be unusual for a girl of PW1's age. He also found what he termed as *'chembechembe za usaha'*. What followed thereafter was the arrest of the Appellant and his arraignment before the Court to answer the said charges.

Reverting to this appeal, at the hearing, the Appellant fended for himself. The Respondent had the services of Ms. Dhamiri Masinde, learned State Attorney.

The learned State Attorney after going through the written submission conceded to the appeal on the ground that the evidence of PW2 was taken contrary to the requirements of section 127(2) of the Evidence Act, Cap. 6. It was contended that from the records what is depicted is the conclusion of the trial Magistrate that PW2 has promised to tell the truth. The learned State Attorney submitted that the trial Magistrate did not ask questions or record replies which could portray that PW1 understands the meaning or nature of telling the truth and not otherwise.

Ms. Masinde, learned State Attorney contended further that the evidence adduced by the Prosecution did not prove the offence beyond reasonable doubts. She exemplified that PW1 got the information about the commission of an offence from PW5 who also got that information from one Jabir Shabani who was not called to testify. It was her submission that since Jabir Shabani was not brought to testify, the evidence of PW1 and PW5 is merely a hearsay which could not warrant conviction.

Basing on those two grounds, the learned State Attorney pleaded this Court to allow the appeal. On the other hand, the Appellant had nothing to add.

Having gone through the written submission as filed by the Applicant and the submission of the learned State Attorney, the issue for my determination is whether the evidence of PW1 was taken in accordance with section 127(2) of the Evidence Act, Cap. 6. The said section provides:

> *'(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.'*

According to section 127(2), 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. From the records, the trial Court, before PW1 adducing her evidence, recorded the following:

> ***'COURT INQUIRY***

> *After conducting due inquiry, a girl is a child of 8 years (tender age) she promised to tell the truth, hence he (sic) will adduce her evidence with an oath as her evidence will not be subjected to cross examination as she knows to respond to the question asked.'*

From the excerpt above, that is not 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 PW2 has promised to tell the truth. The trial Court did not record how it reached to that conclusion since there were no questions and answers that may be deemed to have been asked by the Court in arriving at the promise and conclusion that PW2 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 explaining how the trial Court arrives at the conclusion that the child 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 no evidence in the eyes of the law. The Court observed:

> *'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.'*

In view of this, I hold that the evidence of PW2 was not the evidence within the purview of section 127(2) of the Evidence Act, Cap. 6. In that case, such evidence was not supposed to be used in convicting the Appellant. Therefore, 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 PW2 which has been expunged from the records, the remaining Prosecution's evidence is incapable to prove the 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 7th day of October, 2022.

KS KAMANA

JUDGE

This Judgment delivered this 7th day of October, 2022 in the presence of the Appellant in person and learned Counsel for both Parties.