IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 94 OF 2022

(Originating from Criminal Case No 02 of 2021 of Temeke District Court, at Temeke before A.R. Ndossy- RM)

SELEMANI RAMADHANI ABDALLAH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 5th September, 2022

Date of Judgment: 21st October, 2022

E.E. KAKOLAKI J.

Selemani Ramadhani Abdallah, the appellant herein was indicted before the District Court of Temeke at Temeke for a charge of **Unnatural Offence**, Contrary to section 154 (1) (a) and (2) of the penal Code, [Cap 16 R.E 2019] now R.E 2022. It was the prosecution case that, on unknown dates/months of 2020 at Mbagala Kilungule area, within Temeke District in Dar es Salam Region, the appellant did have canal knowledge of one FH, a boy of five years old against the order of nature. ("FH" has been applied to hide the victim's identity.

For better understanding of the matter, I find it apt to narrate albeit briefly the material background facts which led to the appellant's arrest, charge, conviction and imprisonment sentence as can be deduced from the testimonies of the prosecution witnesses.

On unknown date, FH (PW1) was playing a bit far from his home, where appellant called him and offered him sweets before the appellant who took him to his house, alas! The appellant seized that opportunity to undress the victim and sodomize him. The unwelcomed unnatural act caused PW1 pains before the appellant took him to the toilet and cleaned him while warning the victim not to report the matter to any one otherwise he would be killed by him. It is also alleged the appellant repeated that unlawful act to the victim so many times at his home as FH (PW1) does not stay far from his house.

It appears that, when at scholl FH tried to copy the same act to his fellow pupil, whereas he inserted his fingers to his colleague who narrated the incident to his mother before the incident was reported back to school resulting in summoning of victim's parents at school where the victim (PW1) narrated the whole story. The victim's farther (PW2) reported the matter to Mji Matitu Police station while in company of FH (PW1) and issued with a

PF3 for medical examination (exhibit P1) which was conducted by PW4 the doctor from Mbagala Rangi Tatu Hospital who confirmed PW1 was sodomized. The appellant was then arrested and subsequently charged as earlier on stated, but flatly denied to have committed the offence. Trial ensued and at the end, appellant was awarded a sentence of life imprisonment after the trial court was satisfied that, the charge tabled against him was proved to the hilt. Discontented, the appellant has preferred the present appeal fronting seven (7) detailed grounds of complaints which can be paraphrased as follows:

(1) That there was non-compliance of section 127 (2) of the Evidence Act, [Cap 6 R.E 2019] hence evidence of PW1 is unreliable and cannot form the base of conviction.

(2) That the trial court did not consider defence evidence.

(3) That the appellant was convicted basing on the discredited and untenable evidence of PW1(Victim) who failed to name the assailant at the earliest possible opportunity.

(4) That, prosecution failed to call important witnesses.

(5) That the appellant was convicted basing on insufficient and uncorroborated evidence of PW3, PW4 and PW5.

(6) That there were noncompliance of section 231 (1) (a) and (b) of the CPA, [Cap 20 R.E 2019].

(7) That the case was not proved beyond reasonable doubt.

It is on account of the above grounds of appeal, the appellant is praying this Court to allow his appeal, by quashing the conviction, set aside the sentence and set him free. At the hearing of this appeal which was disposed by way of written submission, appellant appeared in person, while respondent was represented by Ms. Estazia Odhiambo Wilson, learned State Attorney.

Before embarking into consideration of the merit or otherwise of this appeal, I wish to state from the outset that, in perusing the records it came to my attention that the appellant was never convicted the act which is in contravention of sections 235 and 312 of CPA. The cardinal rules of criminal judgment writing demand compliance with the provisions of sections 235(1) and 312 of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the CPA). For clarity I find it apposite to quote the two sections. Section 235(1) of the CPA reads:

> The *court, having heard the complainant and the accused person and their witnesses and the evidence, shall convict the*

accused and pass sentence upon or make an order against him according to law..."

And section 312(2) of the CPA provides:

> *"In the case of conviction the judgment **shall specify** the **offence** of which, and the **section of the Penal Code** or other law under which, the accused person is **convicted** and the punishment to which he is **sentenced".***

These two sections are couched in a mandatory term in that, if at the end of the trial the court is of the opinion that on the strength of evidence adduced in court the accused person is guilty, it must proceed to enter conviction according to the offence charged and the subsequent sentence. Nevertheless, the Court of Appeal has in plethora of authorities applied the principle of 'Overriding Objective' or best known as 'oxygen principle' to assume that since there was a proper sentence, then conviction was entered. In other words the omission does not prejudice the appellant, hence curable under section 388 of the CPA. Such position was so arrived by the Court of Appeal in the case of **Musa Mohamed Vs. R,** Criminal Appeal No. 216 of 2005 (CAT-unreported). The departure was then expounded in the case of **Ally Rajabu and 4 Others Vs. R,** Criminal Appeal No. 43 of 2012 (unreported), **Bahati Makeja Vs. R,** Criminal Appeal No. 118 of 2006, and the case of **Amitabachan Machaga @ Gorong'ondo Vs. R,** Criminal

Appeal No. 271 of 2017 (unreported)**.** In **Amitabachan Machaga @ Gorong'ondo** (supra) page 7 the Court held that:

> *"Ordinarily we would have remitted the record to the High Court for it to enter the conviction so as to make the matter be properly before us for determination on the merit.... However, both attorneys, for the appellant and for the respondent urged us to proceed with the hearing and determination of the appeal to its logical conclusion … on the merit, the justice of the case militates against remitting it to the High Court. We readily agreed. Although we are aware that an appeal is not properly before us where no conviction has been entered by the trial court, we think it is not always that such omission to enter a conviction will necessarily lead to an order of remission of the record to the trial court especially, as in this case, where the justice of the case demands otherwise. In other cases, it has been considered prudent to treat the omission as a mere slip and the Court has deemed the conviction to have been entered. See the case of* ***Imani Charles Chimango Vs. R, Criminal Appeal No. 382 of 2016*** *(unreported). We shall therefore ignore the omission and proceed with the determination of the appeal on the merit"*

In another case of Mabula Makoye and Another Vs. R, Criminal Appeal No. 227 of 2017 (CAT unreported) the Court had this to say:

> *"We think, with the overriding objective in our midst, the position taken in* ***Musa Mohamed*** *(supra),* ***Ally Rajabu & 4 Others*** *(supra) and* ***Amitabachan Machaga @ Gorong'ondo*** *(supra), would be the most progressive path to take in the determination of this appeal. That is why, we think, the first appellate court took a proper path to entertain the appeal, despite the omission by the trial court to enter a conviction before sentencing the appellants. After all, that infraction prejudiced nobody, not even the law. In the premises, we find and hold that the appeal is competent before us."*

Applying the principle from the above cited authorities on the new position of law in our jurisdiction, I also deem the omission curable under section 388 of CPA, and for that matter proceed to determine the matter on merit. The above said, I now revert to consider the merits of the appeal before me, and I start with the first ground of appeal where the appellant faults the trial court for noncompliance to section 127 (2) of the Evidence Act and reliance on his evidence to convict him.

According to the appellant's submission, the record is silent on whether the trial court conducted voire dire to ascertain PW1's knowledge of the meaning of an oath before concluding that he promised to tell court the truth as per the requirements of section 127 (2) of the Evidence Act. He said, the trial

court was required to test the child's intelligence and whether his was promising to tell the truth as PW1's age of 5 years under section 127(5) of TEA is of the child to tender age whose evidence is subjected to the provisions of section 127(2) of TEA. He argued that, the proceedings before the trial court indicate that, PW1 promised to tell the Court the truth but never promise not to tell lies as per the requirement of the law. In his view, the modality used by the trial court can not in any way be construed as meeting the legal requirement of recording the evidence of the child of tender age. To cement his position, appellant cited the case of **Godfrey Wilson Vs. R**, Criminal Appeal No.168 of 2018 (CAT-unreported) which stress on the importance of compliance to section 127 (2) of TEA, and gave guidance on how to reach to the stage of promising to tell the truth. According to him, in the present case, that assessment was not done as envisage in the case of **Godfrey Wilson** (supra). He argued further that, the discredited evidence of PW1 which is crucial to prove the offence facing him, was not properly admitted thus, seriously suffers deficiency of evidential value. To him, if PW1's evidence is discredited, the remaining evidence cannot stand to prove the offence against him as other witnesses testimonials on the perpetrator of the offence is founded on hearsay from

the victim. Added that, the evidence of PW4, who tendered the PF3 as exhibit P1 in court falls short of connecting the appellant with the charged offence, and PW5's evidence (police officer) is on what she did after the accused's arrest.

In response it was Ms. Wilson submission that, section 127 (2) of the Evidence Act, [Cap. 6 R.E 2022] covers for the evidence of the children of tender age and that, before the child adduces his/her evidence the court has to ascertain whether or not such child knows the nature of telling the truth and promises to speak the truth and nothing but the truth. She argued, in the present case, the evidence of PW1 who was a child of tender age whose evidence is found on pages 8-10 of the typed proceedings, promised to tell the truth thus, his evidence is credible and complied with the legal procedures. She said, in the alternative, if the court is of the opinion that the provisions of section 127 (2) of the Evidence Act was not complied with, the omission cannot discredit the testimony of PW1 provided that, in his testimony PW1 told the truth. According to her, the credible testimony of PW1 is sufficient to warrant conviction against the appellant. To back up her stance, she relied on the case of **Wambura Kiginga Vs. R**, Criminal Appeal No. 301 of 2018 (CAT-unreported). In her further view, looking at the

testimony of PW1 as a whole, there is nowhere PW1 contradicted himself as his story remained constant though out. Ms. Wilson implored this court to follow the stance in **Wambura Kiginga,** where the CAT at page 15 cautioned itself and invoked the provisions of subsection (6) to section 127 of TEA, with a view to ensure that an offender is not proclaimed innocent, as the trial court failed to follow the rules of evidence and procedure before recording evidence of the victim who was a child of tender age. It was her further argument that, in sexual offences the evidence of victim is sufficient to warrant conviction as per the case of **Omary Juma Lwambo Vs. R**, Criminal Appeal No 176 of 2020, (CAT -Unreported). On those reasons therefore she concluded, the ground lacks merit hence should be dismissed. In a short rejoinder appellant had nothing useful to add rather than reiterating his submission in chief.

I have carefully considered the submission by both parties as well as perusing the trial court's records seeking to satisfy myself of the complaint raised by the appellant in this ground of appeal. It is undisputed fact that at the time of giving his evidence PW1 was a child of tender age i.e. under 14 years as provided for by section 127 (4) of the Evidence Act as the record reads he was of 5 years old. The next question therefore is whether the trial

court complied with the requirement of section 127 (2) of Evidence Act by establishing that PW1 promised to tell the truth and not lies before giving his testimony. For clarity section 127(2) of TEA is quoted here under:

> *"S.127(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 and not to tell any lies."*

As it can be seen the law requires and suggests that before the trial court arrives to the conclusion that the child witness has promised to tell the truth and not lies upon failure to testify on oath, some questions are to be put to him/her first and have the answers recorded in the proceedings as it was well articulated in the case of **Godfrey Wilson** (supra) where the Court of Appeal had this to say:

> *"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 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.

Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

See also the case of **Hamis Issa Vs. R**, Criminal Appeal No 274 of 2018 (CAT –unreported).

Upon painstaking to peruse the trial court record, I tend to agree with the submissions by the appellant that, there was non-compliance of the said provision. What is seen is the fact that, the trial magistrate made a finding that, the witness (PW1) promised to tell the truth without laying the base of this conclusion by putting first to PW1 the above proposed questions and record the answers accordingly. Thus, there is no basis for his conclusion. For easy of reference, I find it imperative to quote that part of the proceedings as shown at page 8 and 9 of the typed proceedings:

PROSECUTION CASE COMMENCES

PW1: FH, 5 years, Rangitatu Primary School in std 1, live in saku, promises to speak the truth and states as follows: -

As it is noted above the the trial magistrate unprocedurally proceeded to receive PW1's evidence of without first complying with the provisions of section 127(2) of Evidence Act and conditions stipulated in the case of **Godfrey Wilson** (supra). Court of Appeal has on numerous occasions pronounced itself on the requirement of the trial court to record the words of the child of tender age promising to tell the truth. See the case of **Athumani Ally Vs. R**, Criminal Appeal No. 61 of 2022, (CAT -unreported) and **Yusuphu S/O Molo Vs. R,** Criminal Appeal No.343 of 2017 [2019] TZCA 344. The position is to the effect that, the record of the trial court must reflect the words of a child of tender age promising to tell the truth before the trial court allows him to testify. The effect of non- compliance with the provisions of section 127 (2) of Evidence Act (supra) was well articulated in a number of cases including the case of **Yusuph Molo** (supra) where the Court of Appeal had this to say:

"It is mandatory that such a promise must be reflected in the record of the trial court. ***If such a promise is not reflected in the record, then it is a big blow in the prosecution's case…if there was no such undertaking, obviously the provisions of section 127 (2) of the Evidence Act (as***

amended) were flouted. This procedural irregularity in our view, occasioned a miscarriage of justice. It was a fatal and incurable irregularity*. The effect is to render the evidence of PW1 with no evidentiary value. It is as if she never testified to the rape allegation against her. It was wrong for the evidence of Pw1 to form the basis of conviction…" (Emphasis added)*

Further, in the recent case of **Athumani Ally** (supra), Criminal Appeal No. 61 of 2022, (CAT-unreported), the Court had this to say:

"From authorities of the Court, Mr. Paul Kusekwa, the learned State Attorney, is correct to fault the way the trial ***magistrate in this appeal failed to record her engagement with ADM before writing down her conclusion that this child of tender age promised to speak the truth. We think before a trial magistrate or judge allows a child under the age of fourteen to testify under section 127(2) of the Evidence Act, the trial court must record how it engaged that child to conclude*** *that the child promised to tell the truth to the court and not to tell any lies.* ***While there is no formula for what actual words the trial courts should record, what is essential is for the trial court's***

record to leave no doubt that what the court recorded was what the child said. For reasons we have outlined here, we shall delete the testimony of ADM from the evidence on record. *(Emphasis supplied)*

In light of the above cited authority, it is my profound view that, contravention of Section 127 (2) of Evidence Act by the trial court in this matter is fatal and affected evidential value of PW1's evidence, the result of which is to expunged the same from the record, which course I hereby take and order accordingly. Ms. Wilson urged this Court to be guided with the case of **Wambura Kiginga** (supra) and find PW1's evidence qualifies to be considered as credible one for telling the truth. I have gone through that evidence and with due respect I am not convinced to take the course proposed by Ms. Wilson as every case is determined on its own facts, in which in this case as PW1's evidence leaves a lot of traces of doubts.

Having expunged from the record evidence of PW1, the next question is whether there is other independent evidence to support prosecution case on the charge of **Unnatural Offence** against the appellant. Undoubtedly, I find none since the remaining evidence of other prosecution witnesses is not direct evidence for not witnessing the incident, thus, not sufficient to prove

that it was the appellant who committed the unnatural offence to PW1, in contravention of the provision of section 154 (1) of the Penal Code, as the appellant's conviction relied much on the testimony of PW1, which is already expunged.

In the upshot, I find the prosecution case against the appellant to be hanging as the same is not proved beyond reasonable doubt. Thus, the first ground of appeal is meritorious. Since this ground dispose of the appeal, I find no reason to deal with the remaining grounds.

The appeal is therefore allowed, appellant's conviction is quashed and his sentence of life imprisonment set aside. I order the appellant be freed unless otherwise lawful held.

It is so ordered.

Dated at Dar es Salaam this 21st day of October, 2022

E. E. KAKOLAKI

JUDGE

21/10/2022.

The Judgment has been delivered at Dar es Salaam today 21st day of October, 2022 in the presence of the appellant in person, Ms. Gladness Senya, State Attorney for the respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
21/10/2022.