IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO.34 OF 2022

CONSTANTINE BUKELEBE@JIJI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order:04/11/2022

Date of Judgment: 11/11/2022

KAMANA, J:

Initially, this judgment was set to be delivered on 3rd January,2023 on account of my schedule. However, due to the availability of time, I thought it prudent and just to prepare and deliver the same before the scheduled date.

The whole episode led to this appeal took place on 14th May, 2021 at about 1630 hrs at Majengo Nyambiti Areas, Kwimba District in Mwanza Region. It was the prosecution's case that the Appellant in the name of Constantine Bukelebe also known as Jiji unlawfully did have carnal knowledge of one XX (name withheld to conceal her identity), a girl aged 14 years. When arraigned before Kwimba District Court to answer charges of rape, the Appellant denied the charges levelled against him.

With a view to proving its case, the prosecution paraded four witnesses namely XX (PW1 and victim), YY (PW1's young sister and a

child of 13 years of age), ZZ (PW3 and mother of the PW1 and PW2) and G.4744 Detective Corporal Mwantima. During the trial, prosecution was led by Mr. Damas Mboya, Assistant Inspector in the Police Force and the Appellant had no legal services for the purpose of his defence.

Briefly, PW1 testified that on the material date (14th May, 2021), she was at their home when forcibly caught and taken by the Appellant to the kitchen where, under protest, her underpants were removed by the Appellant. Thereafter, the Appellant, against her wishes, inserted his phallus into her untouched pudendum. It was her testification that whilst the Appellant was raping her, out of blue, YY, her younger sister, entered into the kitchen. PW1 further evidenced that she knows the Appellant who used to come at their home as a casual worker.

PW2 on her part told the trial Court that upon entering the kitchen on that fateful date, she found both the Appellant and her sister not only unappareled but also coitusing. It was her evidence that having seen what she saw, she ran from the scene in search of an assistance which she found in her brother and related the incident to him and later to her mother (PW3) who was away from their home.

ZZ who is PW3 testified that on 14th May,2022 was away from her residence and was informed of the incident through a phone call that her daughter had been raped by the Appellant. When arrived at home, she had a talk with her daughter (PW1) who disclosed to her the whole incident. Having heard from the horse's mouth, PW3 reported the matter to the village leader and then to the police. PW4 Detective Corporal

Mwantima testified to have interrogated the victim who was recorded to have been forcefully raped by the Appellant.

In defence, the Appellant squarely denied the charges against him. He testified that the charges were fictitious at the instance of the prosecution. It was his deposition that on the material date, his bicycle was stolen and people gathered at the victim's house on that account.

Having heard the evidence of both parties, the trial Court convicted the Appellant of the offence of rape. Consequently, the Appellant was sentenced to imprisonment for a term of thirty years. Besides, he was ordered to pay a total of Tshs.300,000/- to victim upon completion of his punishment.

Discontented with the decision of the trial Court, the Appellant have brought his appeal before this Court armed with eight reasons. However, for the purpose of determining this appeal, I will confine myself in first and seconds grounds of appeal which state the following:

1. That the learned trial Magistrate erred in law and fact by relying on the evidence of PW1, a child of tender age without complying with the mandatory provisions of section 127(2) of the Tanzania Evicence Act, Chapter 6.
2. That the learned trial Magistrate erred in law and fact by relying on the evidence of PW2, a child of tender age without complying with the mandatory

provisions of section 127(2) of the Tanzania Evidence Act, Chapter 6.

At the hearing of this appeal, the Appellant appeared in person. The Respondent was represented by Mr. George Ngemela, learned State Attorney. Since the Appellant is a lay person, he opted not to argue his grounds of appeal but to adopt them.

Responding, Mr. Ngemela submitted in respect of both first and second grounds. He prefaced by admitting that PW1 and PW2 are children of tender age and in view of that they can adduce evidence without taking an oath. The learned State Attorney submitted that before taking the evidence of PW1 and PW2, the trial Magistrate asked the witnesses on whether they know the meaning of an oath and their replies were in negative.

It was his contention that the trial Magistrate recorded the evidence of PW1 and PW2 strictly in observance of section 127(2) of the Tanzania Evidence Act as the records depict that section 127(2) was complied with. Mr. Ngemela was of the opinion that since the records show that section 127(2) was observed, it goes without saying that the witnesses promised to tell the Court the truth and not lies. He summed up by remarking that the advanced grounds are devoid of merits. Again, the Appellant had nothing to submit other than praying mercy of this Court so that he be released and joins his good family.

Having considered the first and second grounds of appeal and the arguments advanced by the learned State Attorney, the issue for my determination is whether the trial Magistrate complied with the provisions of section 127(2) of the Tanzania Evidence Act. The said subsection stipulates:

> *'(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.'*

Deducing from the quoted subsection, it is apparent that it is not mandatory, as right stated Mr. Ngemela, for a child of a tender age to testify upon taking an oath or making an affirmation. However, a child of tender age can not testify unless he has promised to tell the truth to the court and not to tell lies. This second limb of this subsection connotates compulsoriness.

In order to satisfy myself as to whether section 127(2) was complied with as contended by the learned State Attorney, I thought it prudent to have a look at the proceedings of the trial Court. With regard to what is termed by the learned State Attorney as compliance with section 127 (2), I met the following with regard to PW1:

> *'Voire dire:*
>
> ***Court:*** *Do you the meaning for (sic) oath.*
>
> ***Witness:*** *I don't know the meaning for (sic) the oath*
>
> *S.127 (2) TEA, Cap.6 complied with.'*

As regards to PW2, things went this way:

> *'Voire dire:*
> *Court: Do you know the meaning of giving an oath.*
> *PW2, Replied- I don't know.*
> *S.127(2) of TEA Cap.6. Complied with.'*

The evidence of PW1 and PW2 was taken on 4th November, 2021 being almost five years since *'Mr. Voire Dire* succumbed to natural death' caused by the birth of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016). The said 'death' was confirmed by the Court of Appeal in a number of cases including the case of **Shabani Gervas v. Republic**, Criminal Appeal No. 457 of 2019 in which the highest Court of the land 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.*

See: Bujigwa John @Juma Kijiko v. Republic,Criminal Appeal No. 427 of 2018; **Hando Dawido v. Republic**, Criminal Appeal No.107 of 2018.

In view of the position taken by the Court of Appeal to which I fully subscribe, the learned trial Magistrate misdirected himself in conducting a *voire dire* test.

Reverting to the appeal, it is a trite law that Court when taking the evidence of a child of tender age, it must ensure that the witness is promising to tell the Court the truth and not lies. This is clearly stipulated in section 127(2) of the Tanzania Evidence Act as quoted hereinabove. Section 127(2) as it is now has been interpreted in several occasions by the Court of Appeal. In the case of **Bujigwa John @Juma Kijiko** (Supra), the Court of Appeal stressed that the evidence of the child of tender age ought to be taken and considered after the child promises to tell the truth and not otherwise. The Court stated:

> *'According to the amendment, a witness of tender age may give evidence without taking an oath or affirmation* ***but before giving evidence he/she shall promise to tell the truth to the court and not to tell lies.'*** (Emphasis added).

In its recent decision of the case of **Hamidu Yunusu v. Republic**, Criminal Appeal No. 293 of 2019, the Court of Appeal reiterated its position with regard to evidence of the child which is taken under section 127(2). The Court observed:

> *'The above provision has been consistently construed by the Court to mean that, giving a promise to tell the truth and not to tell lies is a condition precedent for admissibility of the evidence of a child of tender age which is given without oath or affirmation.'*

From the records, the trial Magistrate did not record the promises of the PW1 and PW2 to tell the truth and not lies. What is on record is the

phrase to the effect that section 127(2) was complied with. The words suggesting that section 127(2) had been complied with are insufficient to establish that a witness who is a child of tender age had promised to tell the truth and not otherwise. In the case of the **Hamis Ramadhani Lugumba v, Republic**, Criminal Appeal No. 565 of 2020, the Court of Appeal held:

> *'In the appeal before us, the appellant testified without compliance with the requirement of section 127 (2) of the Act, and that what is reflected on page 10 of the record of appeal, in our view, does not read or sound like compliance to the provision. What is on record reads:*
>
> *"PROSECUTION CASE OPEN IN CAMERA*
> *PW 1:..... 9 yrs I promise this court that I shall tell the truth and not tell any lies S. 127 (2) of the Evidence act as amended by written Laws (Miscellaneous Amendments) Act complied with."*

In view of this, I hold that what is purported by the trial Magistrate to be a compliance with the provisions of section 127(2) is not a compliance envisaged by such subsection. In this regard, I thought it necessary to, albeit, briefly elucidate what was supposed to be done by the trial Magistrate. From the wording of section 127(2), there is no laid down procedure for the Court to conclude that a child of tender age who would be a witness understands the meaning of truth and promises to tell the truth and not lies. Though the law is silent, the Court of Appeal has laid down the procedure through which the Court may conclude that a

child witness understands the nature of truth and is capable of promising to tell the truth and not lies.

The said procedure is well enunciated by the Court of Appeal in the case of **Godfrey Wilson Versus the Republic,** Criminal Appeal No.168 of 2018 where the Court stated:

> *"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 the cited case, the Court of Appeal stressed on the importance of elucidating how the trial Court arrives at the conclusion that the child understands the nature of truth and the duty to speak truth.

At this point, it is my holding that the evidence of PW1 and PW2 was taken in contravention of section 127(2) of the Tanzania Evidence Act. Principally, the evidence which is taken contrary to established principles is not evidence in the eyes of the law. In **Godfrey Wilson's case**, the Court of Appeal had this to state:

> *'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.'*

Mindful of the records, section 127(2) and the principles articulated in the cited cases, I am of the settled view that the evidence of PW1 and PW2 was worthless in the eyes of the law. In that case, I expunge the evidence of PW1 and PW2 from the records of the trial Court.

Having expunged the evidence as I stated hereinabove, the next question for my determination is whether the remaining evidence can support the conviction and sentence meted out against the Appellant. After considering the evidence of PW3 and PW4, I am of the position that their testimonies cannot sustain conviction against the Appellant. No one amongst them testified to have seen the Appellant committing the alleged offence. Further, in the absence of the evidence of PW1 and PW2, there

is no even circumstantial evidence which linked the Appellant and the offence with which he was charged.

That being the case, I do not see any reason to address other grounds of appeal as the first and second grounds determine the appeal. I allow the appeal. The conviction and sentence are therefore quashed and set aside respectively. I order that the Appellant be set free unless otherwise lawfully held. It is so ordered.

Right To Appeal Explained.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY

KS Kamana

JUDGE

11/11/2022

The Judgment delivered this 11th day of November, 2022 in the presence of learned Counsel for both parties.

KS Kamana

JUDGE

11/11/2022