IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

(DC) CRIMINAL APPEAL NO. 61 OF 2022

(Original Criminal Case No. 42 of 2021 of the District Court of Kondoa at Kondoa)

ALLY NASSORO MAJALA @

MZEE WA PAZO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

9/11/2022 & 15/12/2022

MASAJU, J.

The Appellant, Ally Nassoro Majala @ Mzee wa pazo, was charged with, and convicted of three counts of **Unnatural Offence** each contrary to section 154(1)(a) and (2) the Penal Code [Cap. 16, RE 2019] in the District Court of Kondoa. He was sentenced to serve life time in prison and pay the victim compensation to the tune of Tsh.500,000/=. Aggrieved by the trial court's judgment, the Appellant has sought the appeal before this Court.

The Appellant's Petition of Appeal comprises seven (7) grounds of appeal which can be summarised into one major point, that; the prosecution case against him was not proved beyond reasonable doubt since their evidence was insufficient.

When the Appeal was called for hearing, Mr. Denis Lazaro, the learned counsel, represented the Appellant whilst Ms. Mariathereza Kamugisha, the learned State Attorney, represented the Respondent Republic.

Arguing for the appeal, the Appellant initially abandoned the 3rd, 4th, and 6th grounds of appeal in the Petition of Appeal. He then stated that he shall consolidate the 1st and 5th grounds to form one ground whereas the 2nd and 7th grounds into another ground hence two grounds of appeal.

Regarding the 1st and 5th grounds, the Appellant submitted that the trial Court erred in law and fact for receiving the evidence adduced by PW1, PW3 and PW5 contrary to section 127(2) of the Evidence Act [Cap 6, RE 2019]. That, the trial court had to satisfy itself with, first, as

to whether the victims of crimes witnesses were PW1, PW3 and PW5 were capable of telling the truth and not lies as per the case of **John Mkorongo James v. The Republic** (CAT) Criminal Appeal No. 498 of 2020, Dar es salaam Registry (unreported) wherein the Court made reference to the holding in the case of **Godfrey Wilson v. Republic,** (CAT) Criminal Appeal No. 168 of 2018, Bukoba Registry (unreported). The Appellant stated that, the remedy thereof is to expunge the evidence of PW1, PW3 and PW5 from the record of proceedings whereby the prosecution case would hang on a too thin thread of evidence to ground a sustainable conviction as per the case of **Daniel Makalamba v. The Republic** (HC) DC Criminal Appeal No 143 of 2020, Dodoma Registry (unreported).

On the 2nd and 7th grounds the Appellant submitted that the evidence by Doctor Florence Hillary (PW7) in support of Exhibits P1, P2 and P3 does not reveal the cause of injuries to the victim. The Appellant argued that such fact cast doubts on the prosecution case as to whether or not the said exhibits implicate the Accused with the offence he was charged and convicted of as per the guidance in **Shaban Athumani @**

Lissu v. The Republic (HC) DC Criminal Appeal No.9 of 2020, Dodoma Registry (unreported) bearing in mind that the victims PW1, PW3 and PW5 were medically examined after five days. The Appellant argued that the prosecution case was not proved beyond reasonable doubt and finally prayed that the Court be pleased to allow the appeal accordingly, quash the conviction, set aside the sentence and the compensation orders.

The Respondent Republic contested the appeal and stated that the evidence adduced before the trial court by the prosecution witnesses proved the case beyond reasonable doubt. In relation to first consolidated ground of appeal, she submitted that Section 127(2) of the Evidence Act [Cap 6, RE 2019] was complied with before the trial Court in relation to PW1, PW3 and PW5. She claimed that all the said witnesses promised to tell the truth not lies before the trial Court. However, she argued that as per the guides in the decision of **Wambura Kiginga v. The Republic** (CAT) Criminal Appeal No.301 of 2018, Mwanza Registry (unreported) conviction can be reached even in the non-compliance of section 127(2) of the Evidence Act [Cap 6, RE

2019] by basing on subsection (6) of the same section. The Respondent Republic insisted that in the instant case section 127(2) of the Evidence Act [Cap 6, RE 2019] was complied with.

As regards the 2nd consolidated ground of appeal, the Respondent Republic stated that though the Medical Examination Report (PF3), prosecution exhibits "P1", "P2" and "P3" did not state the cause of the anal penetration but it categorically stated that there was anal penetration and that the best evidence is that of the victims of sexual offence themselves as they so testified in the trial Court. At last, the Respondent Republic prayed the Court to dismiss the appeal in its entirety.

In rejoinder, the Appellant maintained his submissions in chief. That is all what was submitted by the parties in this appeal.

The Court finds that, the prosecution case before the trial court was not proved to the required standard; *to wit*, beyond reasonable doubt for want of credibility of their key witnesses and insufficiency of their evidence. While the Appellant submitted that section 127(2) of the

Evidence Act [Cap 6, RE 2019] was not complied with by all victims of crime (PW1, PW3, and PW5), the Respondent Republic argued that the section was complied with. The record of the proceedings in the trial court before the victims of crime unsworn evidence being recorded is to the effect, thus;

> *PWI- Zamaya Yusufu, 10 years old, lives at Ubembeni street; Is asked to promise to tell the truth and she replies; - Zamaya Yusufu: I promise to tell the truth and not lies to this Court.*
>
> *PW3- Swalehe Amiri Tesa, 9 years old, Muslim, lives at Ubembeni street, studies at Ubembeni Primary School; Is asked to promise to tell the truth and she replies; - Swalehe Amiri Tesa: I promise to tell the truth and not lies to this Court.*
>
> *PW5- Alia Ally Kipara, nine years old, Muslim, student at Ubembeni Primary School. Alia Ally Kipara: I promise to tell the truth and not lies to this Court.*

The above is contrary to section 127 (2) of the Evidence Act [Cap 6, RE 2019] because the trial Court did not initially examine the victims of crime (PW1, PW3 and PW5) so to assess whether they are capable of

comprehending the questions kept to them and answer them rationally. The effect of such omission is that it renders their evidence valueless and such evidence deserves to be expunged from the record. Reference to this point be made to the cases of **John Mkorongo James** (supra), **Gofrey Wilson** (supra) (to name a few).

The argument by the Respondent Republic that even though the said evidences was adduced contrary to section 127(2) of the Evidence Act] [Cap 6, RE 2019] the same is curable under subsection (6) of the same provision as held in **Wambura Kiginga v. The Republic (Supra)** is unsupported in the instant case. The Court further takes cognisance of the elementary principle of law that *"each case must be decided largely on its own facts and that the core function of Courts is to ensure that justice is done by whatever means"* as patently and distinctly applied by the Court of Appeal in several cases, **Wambura Kiginga v. The Republic (Supra)** case inclusive.

Guided by the above principle, the Court finds that the illegally adduced evidence in the instant case is not curable under section 127 (6) of the Evidence Act [Cap 6, RE 2019]. This is because the victims of

crime (PW1, PW3 and PW5)'s evidence portray no exceptional and meritorious circumstances that justify remedying non-compliance of section 127(2) the Evidence Act [Cap 6, RE 2019] under subsection (6) of the said section. The incident as complained of by all victims of crime occurred on the same date and all were together but there are vast discrepancies in their stories calling for credibility of their testimonies.

For instance; PW1 & PW5 named the date of alleged incident (19/05/2021) in their evidence in chief, PW3 did not. PW1 stated that as she headed home, PW5 who was with the Appellant called her. PW3 stated that it was around noon when he was about to leave school, he saw the Appellant at the school shop who called him and gave him a parcel and they went to his home he was with PW5. PW3 further claimed to be with both PW1 and PW5 while at the Appellant's backyard. PW5 stated that as they (all three) were arriving from school they went to the Appellant's home who later left them and went to buy mango juice for them.

While PW1 stated the Appellant gave them chewing gum and soda/juice wherein he kept a medicine which had a picture of a

pregnant woman, PW3 only stated that the Appellant gave them soda (fanta). And PW5 stated that the Appellant gave them mango juice.

PW3 only stated that the Appellant first raped him. PW1 testified that she was anal raped by the Appellant but PW3 did not mention if the Appellant anal raped PW1 & PW5. Simply each victim did not explain whether the Appellant raped the other and how? If they witnessed or not? They only testified on themselves regardless that both alleged to have been anal raped at the same spot and time. At some point they claimed to have pass out by sleep, but how would such children of tender age fall in heavy sleep not to hear if not see such ongoing acts amongst themselves?

It was only PW3 mentioned that when they woke up, they found traces of blood on their private parts. PW3 stated that PW1 woke them up while PW1 stated that it was PW5 who woke them up. When cross-examined PW3 gave a dissimilar and contradictory narration to his earlier version of the story by stating that he found the other two children at the Appellant's home and that he does not know their names. That, when the Appellant raped him, those children were not

present and that the Appellant gave them drugs contrary to the soda which mentioned in her evidence in chief.

On his part the Appellant consistently denied the committing the offence as seen in his evidence in chief (defence) and thorough cross-examination against each victim and other witnesses. Also, when cross-examined he flatly and boldly denied the charge.

The above notwithstanding, the Court maintains a view that, even if section 127(2) of the Evidence Act [Cap 6, RE 2019] had been complied with, the evidence by prosecution in the instant case is fraught with reasonable doubts thus unsafe to ground a conviction. Apparently, the Court is constrained to expunge the illegally adduced evidences of the victims of crime (PW1, PW3 and PW5) from the record of proceedings as it is hereby done so.

The guiding standard in section 127(6) of the Evidence Act, [Cap 6 RE 2019] and 115 (3) of the Law of the Child Act, [Cap 13 RE 2019] is truth and credibility. The evidence adduced by the alleged victims of

crime PW1, PW3 and PW5 fell short of the said standard of truth and credibility, hence not useful to the prosecution case.

Having expunged the victims of crime (PW1, PW3 and PW5)'s evidence, the remaining evidence is insufficient and cannot justify the Appellant's conviction. The evidences of PW2, PW4, PW6, PW9 are hearsay and incapable of incriminating the Appellant of the offence charged. Fatuma Iddi (PW2), the grandmother of PW1 was just informed about the alleged offence by a police officer (Waziri) while at home. Similarly, Hazla Juma (PW4), the grandmother of PW3 was just informed about the alleged offence by a police officer (Waziri) while at home. Salma Batholomeo Aithu (PW6), the mother of PW5 was merely informed by PW5 about the alleged offence. Equally, Ass. Inspector Magreth Temba (PW9), a police officer did only receive the information about the alleged offence. No witnesses saw the Appellant committing the offence charged.

The evidence by Doctor Florence Hillary (PW7) who filled the Medical Examination Reports, PF3 (Exhibit P1 & P2) is highly suspect. She stated in her testimony that the victims of crime (PW1 and PW3)

had been anal raped since she found sphincter was not strong. However, both Exhibit P1 & P2 as filled by her are incomplete and lacks corelation in respect to her testimony. On Exhibit P1's place of description of the physical state she recorded, thus:

> *"Non evidence of vaginal sex. Abrasion and hyperemic anal wall"*

In the Medical Practitioners Remarks, she further recorded thus:

> *"There is evidence of anal penetration."*

On Exhibit P2's place of physical description she recorded, thus:

> *"There is evidence of anal penetration."*

In the Medical Practitioners Remarks, she similarly recorded thus:

> *"There is evidence of anal penetration."*

Perusing such observations and findings, it is unclear how Dr. Florence Hillary (PW7) testified that the anal sphincter was not strong suggesting anal rape. She did not even make it clear as to whose anal sphincter was not strong as she examined several victims. In sum, it suffices it to state here that her evidence is weak, it does not establish

that it was indeed the flesh blunt object which penetrated into the victims of crime anus.

Likewise, the evidence by Doctor Emilian Valentino (PW8) who filled the Medical Examination Report, PF3 (Exhibit P3) is insufficient therefore doubtful. She testified that her investigation revealed signs of anal rape to victim of crime (PW5)'s anus since on touching it was not responding in the ordinary manner and that her finger went in without any resistance. The question to be pondered here is whether openness of an anus, with no bruises or lacerations and that a finger enters easily be regarded as evidence establishing penetration by a blunt object? Simply stated Exhibit P3 leaves so much to be desired that is why PW8 himself (Doctor Emilian) when cross examined by the Appellant admitted to not knowing when and who raped the victim (PW5).

That said, the prosecution case against Appellant was therefore not proved beyond reasonable doubt. The appeal is hereby allowed accordingly. His conviction and sentence meted by the trial court against the Appellant on all three counts are hereby quashed and set

aside respectively. The Appellant shall be released from prison forthwith unless otherwise held for another lawful cause.

GEORGE. M. MASAJU

JUDGE

15/12/2022