IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 213 OF 2021

Appeal from the decision in Criminal Case No. 686 of 2019 of the District Court of Ilala at Samora Avenue (Nkwera, RM) dated 11th of June, 2021.)

GODFREY MICHAEL ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

7th, & 9th March, 2022

ISMAIL, J.

The proceedings from which the instant appeal emanates involved a charge of grave sexual abuse, allegedly committed by the appellant against AAA, a girl aged 9 years of age. The offence allegedly occurred on 5th January, 2019, at Kitunda Kipera, within Ilala District in Dar es Salaam Region. It is alleged that, to satisfy his sexual gratification, the appellant inserted his fingers into the victim's vagina and anus.

The allegation by the prosecution was that, on the fateful day, the victim, PW3, was washing her clothes and was sat together with a girl called Angel and her nephew. The victim was then sent by a relative to go to the

appellant's room to pick some money which was stashed under the pillow in Angel's bed. On entering the room, the appellant grabbed the victim and caressed her. The appellant then covered the victim's mouth with a piece of cloth (khanga) and inserted his fingers into the vagina and anus. After the appellant was done, PW3 left for home while bleeding. She then narrated the story to Angel and her nephew. Angel called the appellant's mother and narrated all what had transpired.

News of the incident reached the victim's parents. Enraged at what had happened, the said parents reported the matter to police where a compliant was lodged and from which PF3 was issued. The victim was taken to Amana hospital for medical examination and treatment. Arrest of the appellant culminated into interrogation and arraignment in court where he pleaded not guilty.

The trial court was convinced that guilt of the appellant had been established. He was convicted and sentenced to imprisonment for 20 years. The decision was greeted by serious outrage from the appellant. He lodged an appeal through a petition of appeal which has four grounds of appeal, reproduced as follows:

1. *That the trial magistrate erred In law and in fact by convicting and sentencing the appellant basing on the evidence of PW3 who is a*

person of a tender age without any assessment on credibility of the evidence of the said witness.

2. *That the trial magistrate erred in law and in fact by denying the appellant the right to cross examination at the trial.*

3. *That the trial magistrate erred in law and in fact by convicting and sentencing the accused person without any strong evidence from the prosecution side to prove their case.*

4. *That the trial Magistrate erred in law and in fact by ignoring the heavy evidence of DW5 who was very nearby the scene of the crime.*

Hearing of the appeal saw the appellant represented by Mr. Joseph Msengezi, learned advocate, while the respondent was represented by Ms. Angela Nchala, learned Senior State Attorney.

Mr. Msengezi began his submission by informing the Court that he was abandoning ground 2 of the appeal. This left the appeal with three grounds.

Submitting on ground one, Mr. Msengezi stated that the procedural aspects prior to taking evidence of PW3, a child of tender age, were not followed. He argued that a test was not carried out with a view to establishing if the witness knew the meaning of taking an oath or affirmation, and lead her to promise to tell the truth and no lies. Such failure, learned counsel argued, violated section 127 (2) of the Evidence Act, Cap. 6 R.E.

2019. Mr. Msengezi contended further, that such failure was also a violation of the imperative requirement set out in ***Godfrey Wilson v. Republic***, CAT-Criminal Appeal No. 168 of 2018; and ***Masoud Mgosi v. Republic***, CAT-Criminal Appeal No. 195 of 2019 (both unreported). He urged the Court to expunge the discrepant testimony.

Mr. Msengezi further asserted that, having chalked off the testimony from the records, the remainder of the evidence is purely a hearsay account which is unable to support the conviction. He prayed that this ground of appeal be allowed.

With regards to ground two, the appellant's contention is that his conviction was not based on any weighty evidence. He argued that, while PW1 testified that the victim was found with bruises in her vagina, she did not tell what caused the bruises, taking into account his testimony at page 14 of the proceedings, where he was quoted as saying that a soft object was inserted in the victim's vagina. It is not clear, either, that the victim lost her virginity and when.

Mr. Msengezi imputed contradictions in the testimony of PW3 who, at one time said she got into the appellant's room once, while at another instance she alleged she got in twice. He cast some doubt on how the offence

would be committed in a busy house with more than ten tenants yet no body was aware of the incident.

Throwing another salvo at the testimony of PW4, he said that the case he investigated was in relation to indecent assault, whilst the appellant was charged with the offence of grave sexual abuse.

It was learned counsel's testimony that the prosecution's testimony was not enough to convict.

Regarding ground four of the appeal, the contention by Mr. Msengezi is that testimony of DW5, the neighbor, was strong and reliable but ignored by the trial court. He argued that the said witness was at the scene of the crime and better suited to give a credible story on what happened. Her testimony ought to have been believed and relied upon but it was not.

Overall, the appellant contended that the evidence by the prosecution did not meet the standard set in section 110 of Cap. 6. He prayed that the appeal be allowed.

Ms. Nchala's rebuttal submission began by expressing her total support to the trial court's verdict and sentence. With regards to ground one, her contention is that PW3 made a promise to tell the truth as observed at page 20 of the proceedings. On section 127 (2) and the case of ***Godfrey Michael*** (supra), Ms. Nchala took the view that, since the word applied is ***"may"***

then the meaning is that compliance with it is a matter of one's choice but not mandatory. She argued that the trial court found the witness credible and believed her. It was her take that the promise to tell the truth includes a promise not to tell lies. She held that the ground is baseless and prayed that the same be dismissed.

Submitting on ground three, Ms. Nchala argued that the testimony of PW3 was enough to ground a conviction, especially because she is the victim who had identified the appellant, her neighbours. This testimony was corroborated by that of PW2 and PW1 the latter of whom examined PW3 and found that she had lost her hymen when the appellant inserted her fingers into the vagina.

Learned attorney argued that there was no reason why would PW3 pick the appellant while it has not been stated that they had any quarrels or differences that would be the reason for framing him up. She also argued that the victim named the appellant immediately after the incident, as shown at pages 18 and 21 of the proceedings.

Addressing the contradictions, Ms. Nchala argued that PW3 denied having gone to the appellant's room twice. She also contended that DW5 admitted to have seen PW3 getting into the appellant's room. It was her

submission that the trial court assessed her demeanor and chose to believe her.

On PW4's testimony, Ms. Nchala argued that the same was not harmful as long as the rest of the testimony was unanimous that the offence was that of grave sexual attack. She maintained that the discrepancy caused by PW4 does not go to the root of the matter.

The appellant's rejoinder submission did not introduce anything new. The appellant reiterated what was submitted in the submission in chief.

Disposal of this appeal will begin with ground one, which queries the trial court's failure to follow the requirements of section 127 (2) of Cap. 6. It is trite law that, before the testimony of a child of tender age is taken, the trial court must take the witness through the 'rituals' stated in the said provision. These include conducting a test which would enable the court to assess if the witness knows the meaning of taking oath or affirmation. It would also entail ascertaining if the child witness knows the need to tell the truth and no lies before he or she promises. This is the position that obtains in section 127 (2) of Cap. 6 and underscored in numerous decisions, including those that were cited by Mr. Msengezi. Implementation of this entails conducting a question - and - answer session that precedes adduction of testimony. This step is so essential and imperative that non-compliance

with it has the consequence of vitiating the testimony adduced by the witness.

As stated earlier on, section 127 (2) of the CPA does not provide for a known procedure on how the said test is to be carried out. Fortunately, however, court pronouncements have filled the void and guided on how that goal may be achieved. The Court of Appeal's decision in ***Geoffrey Wilson v. Republic***, CAT-Criminal Appeal No. 168 of 2018 (unreported), stands out as a standard bearer which should be dutifully conformed to. The upper Bench held in this case, as follows:

> *"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."*

See also: ***Hamisi Issa v. Republic***, CAT-Criminal Appeal No. 274 of 2018; ***Issa Salum Nambaluka v. Republic***, CAT-Criminal Appeal No. 272 of 2018; and ***Jackson John v. Republic***, HC-Criminal Appeal No. 30 of 2021 (all unreported).

Taking stock at what transpired in trial proceedings that bred the instant appeal, the obvious fact is that this procedure was thrown by the wayside. The trial magistrate jumped straight to demanding that the witness gives a promise which she did. But no assurance was given on her level of comprehension of what entails telling the truth or lies and the implication of telling lies. Ms. Nchala has held the view that the trial court was not under that obligation as the word used is "**may**", connoting that it is optional. With respect, this is a misconception. The word "**may**" applies to the option to give evidence without taking an oath or affirmation but when it comes to making a promise then the doing of it is mandatory. The procedure stated in ***Geoffrey Wilson v. Republic*** (supra) is exercised where a conclusion has been made that the witness is going to give a promise.

It is in view of the foregoing that we agree with Mr. Msengezi that the process of procuring a promise from PW3 was short circuited by the trial court and drifted from what the law provides in that respect. This was horrendous and the effect is fatal. The inevitable consequence is to have the discrepant testimony of PW3 expunged from the record of proceedings. This is the invitation that I happily accept and I order that the PW3's testimony be expunged.

Looking at the residual witness, as adduced by the rest of the witnesses i.e. PW1, PW2, and PW4, it comes out that this is purely a hearsay evidence which cannot stand on its own and incriminate the appellant. The testimony of PW5 of little or no significance in terms of establishing who the offender was. This simply means that the case against the appellant has not been proved to the required standard. This ground succeeds and is allowed.

On the basis of this ground alone the appeal is allowed. The conviction and sentence imposed by the appellant are hereby set aside, and the appellant should be immediately released from prison, unless he is held for any lawful reason.

The rest of the grounds are superfluous.

It is so ordered.

DATED at **DAR ES SALAAM** this 9th day of March, 2022.

M.K. ISMAIL

JUDGE