IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO.99 OF 2022

(Originating from Criminal Case No. 461 of 2019 in the District Court of Ilala at Ilala)

PATRICK BRYTON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 29/09/2022

Date of Judgment: 29/09/2022

Kamana, J:

In the District Court of Ilala, the Appellant one Peter Bryton was charged with and convicted of the Unnatural Offence contrary to section 154(1)(a) of the Penal Code [RE. 2002]. It was alleged by the Prosecution that on unknown dates in the year 2019, the Appellant did have carnal knowledge of one **XX** (name withheld to conceal his identity) a boy of seven years old against the order of nature.

The facts leading to the arraignment of the Appellant as can be discerned from the records are to the effect that on unknown date in the year 2019 the victim XX (PW1) went to the accused's place to play with his fellow kids including one named as Peter. In the midst of their play, the Appellant who was well known to PW1 called the latter in his room. Upon entering the room, the Appellant told PW1 to undress his trouser.

PW1 refused to undress and it follows that the Appellant undressed him and himself. Being as the day they were born, the Appellant inserted his phallus in the PW's anus. It is said that the Appellant repeated that act three times at the same time.

Following that act, PW1 was hurt but he could not shout or scream since he was ordered by the Appellant to remain silent and not to relate the incident to anyone. It was further stated that the Appellant threatened PW1 that he will be subjected to slaughter if, in any case, he will divulge what has happened to him.

Thereafter, PW1 wore his trouser and headed back home and reported the matter to his mother who is PW2 (name is withheld for the purpose of concealing PW's identity). From there, PW1 was taken to the Police where PF3 was issued by WP 5784 DC Olivia (PW3) and then he was examined at the Amana Hospital by Dr. Naetwe Mbaga (PW4).

Upon completion of the investigation and gathering of evidence including PF3 (Exhibit P1) which, among other things, evidenced that in PW1's anus there were particles called *epitheliums cells* which indicate that there was much interactions in anal area in the sense that PW1 was sodomised, the Appellant was arraigned before the trial Court to answer

charges of Unnatural Offence contrary to the section 154(1)(a) of the Penal Code, Cap. 16 [RE.2002].

When the charge sheet was read to him, the Appellant entered a plea of not guilty. As a result, the case proceeded to a full trial whereby the Prosecution paraded four witnesses named hereinabove and relied on one exhibit, PF3. On his part, the Appellant had three witnesses including himself as DW1, Maria Maziku (DW2) and Yohana Mhambala (DW3).

At the conclusion of the trial, the Appellant was convicted of the offence he was charged with and subsequently sentenced to life imprisonment.

Dissatisfied with the decision of the trial Court, the Appellant is now engaging this appellate Court in a bid to reverse the decision of the former Court. His appeal is grounded with nine reasons which are hereunder reproduced verbatimly:

1. *That, the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant to life imprisonment relying on a fatally defective charge as the date, time of which the offence was committed was not specified, to enable the appellant make an informed defence.*

2. *That, the learned trial Magistrate erred in law and fact by convicting the appellant believing he is the offender and not the said Peter (should be the first accused) as testified by Pw2.*
3. *That the learned trial Magistrate erred in law and fact by convicting the appellant relying on contradictory testimonies of Pw1 and Pw2 regarding how Pw2 got informed of the incident. IT IS CONSEQUENTIAL.*
4. *That, the learned trial Magistrate erred in law and fact by convicting the appellant relying on a fatally contradicted Pf.3 which did not state the actual cause of the bruises on the anus but ended only on bacterial test. Also PF.3 is fatally misleading since the test was conducted after days (as imposed by the trial magistrate) of the incident.*
5. *That, the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant relying on an incredible and unreliable testimony of a doctor who could not help the court, by failing to state the exact or possible cause of the bruises on the anus of the victim, as did not testify anywhere throughout his evidence that it (the bruises) was caused by any kind of penetration.*

6. *That, the learned trial Magistrate erred in law and fact for not relying on the witness of alibi raised by DW2 (sister of the appellant) who testified that she went to the farm with the appellant on the day of the alleged incident to determine the innocence of the appellant.*
7. *That, the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant to life imprisonment for an offence which the actual offender (Peter) has already been punished as rightly testified by Pw1 (the mother of the victim).*
8. *That, the learned trial Magistrate erred in law and fact for not ordering for a test on the impotence of the appellant before arriving at the conclusion to convict and sentence the appellant to life imprisonment.*
9. *That, the learned Magistrate erred in law and fact by convicting the appellant and sentencing him to live the rest of his life in prison, die in prison and be buried in prison (LIFE SENTENCE) in a case where the prosecution could not prove its case beyond reasonable doubt.*

Relying on those grounds of appeal, the Appellant is praying this Court to allow the appeal, quash the conviction, set aside the sentence and set him at liberty.

When the appeal was called on for hearing, the Appellant appeared in person without legal representation. The Respondent was ably represented by Ms. Yasinta Peter, learned Senior State Attorney.

When invited to submit with regard to his grounds of Appeal, the Appellant requested this Court to adopt his grounds of appeal as his submission. He further requested the learned Senior State Attorney to firstly address the Court in respect of the grounds of appeal.

In her submission, the learned Senior State Attorney prefaced by supporting both conviction and sentence. She vigorously argued all nine grounds of appeal in opposition. However, I will not go through the grounds of appeal as argued by the learned Senior State Attorney for the reason that is reflected in the next paragraphs.

In the course of hearing this appeal, the Court *suo motto* raised two points of law and probed the parties to address them. As a matter of legal practice, when a point of law is raised, it takes precedence over other issues, in this case merits of an appeal. The issues were as follows:

1. Whether the trial Court complied with section 127(2) of the Tanzania Evidence Law, Cap. 6 in recording the evidence of PW1 (a child of seven years old).
2. Whether conviction of the Appellant did not occasion injustice taking into consideration that he was charged under section 154(1)(a) of the Penal Code, Cap.16 and convicted under section 154(1)(a) and (2).

The Appellant being a lay person had nothing useful to comment on the raised legal issues.

Ms. Peter, the learned State Attorney addressed the Court on both two issues raised *suo motto.* However, for the purpose of disposing of this Appeal, I will direct myself on the first issue.

It was the submission of the learned Senior State Attorney that PW1's evidence, as a child of seven years old, was taken in accordance with the provisions of section 127(2) of the Tanzania Evidence Act. To substantiate her arguments in that regard, the learned Senior State Attorney referred the Court to page 11 of the typed proceedings in which the trial Magistrate recorded:

> ***'VOIRE DIRE TEST:***

Court: Do you know about taking an oath.

PW1: Not really.

Court: Since he does not understand the meaning/nature of oath I inquire him to promise the truth to the court and not tell lies.

PW1: Yes, I promise to tell the truth and not lies.

Court: While saying the words he nods his head in approval.

Court: End of the test, I shall proceed to record evidence.'

To the learned State Attorney, this was sufficient enough to proceed with the recording of the evidence of PW1 in line of section 127(2) of the Tanzania Evidence Act as PW1 promised to tell the truth and not otherwise. She further referred this Court to the decision of the Court of Appeal in the case of **Wambura Kiginga v. Republic**, Criminal Appeal No. 301 of 2018 (Unreported) in which the Court of Appeal considered the evidence of the child of a tender age which was received in contravention with the provisions of section 127(2). The learned Senior State Attorney was of the view that, in line with section 127(6), the

evidence of the child of a tender age can be received and considered as it was in the **Wambura Kiginga (Supra)** without due regard to the provisions of section 127(2). In summing up, the learned Senior State Attorney submitted that the evidence of PW1 was legally received and considered and should continue to form part of the records.

Having considered the arguments advanced by the learned Senior State Attorney, the issue for my determination is whether section 127(2) was complied with by the trial Court in recording the evidence of PW1.

According to section 127(2), it is not mandatory 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 provision connotates compulsoriness. Section 127(2) reads:

> *'(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.'*

From the quotation of the proceedings with regard to the purported *voire dire test,* the trial Court asked PW1 on whether he understands the meaning of taking an oath. PW1 replied "not really". This answer

definitely suggests that the replier did not know the meaning of taking an oath. What follows thereafter was an opinion of the trial Court that PW1 did not understand the meaning/nature of an oath and then proceeded to inquire him to tell the court truth and not lies. In responding to that inquiry, PW1 promised nothing other than to tell the truth to the trial Court and not to tell lies. The Court recorded that in promising to tell the truth and not otherwise, PW1 nodded his head in approval. From there the Court marked it as an end of the test and proceeded to record PW's evidence.

Though from the looks of the excerpts quoted from the proceedings, one may argue that PW1 promised to tell the truth and not lies within the purview of section 127(2), I hold a different view. In finding that PW1 promised to tell truth and not lies, the trial Court did not show how it reached to that conclusion that PW1 has promised to tell the truth but not lies. What is on record is the way the trial Court asked PW1 to tell the truth to the court and not to tell lies. The answer of PW1 that he promises to tell the truth and not lies, to me, amounts to a chorus in reply to what has been dictated by the trial Court.

In this respect, may I invite the Court of Appeal in the case of **Godfrey Wilson v. the Republic**, Criminal Appeal No.168 of 2018. In that case, the Court of Appeal 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)

It is my considered view that in recording and considering the evidence of PW1, the trial Court was supposed to show how it reached to the conclusion that PW1 is telling the truth and not otherwise. In doing so and taking into consideration that PW1 did not understand the meaning of an oath, the trial Court was supposed to go further in ascertaining whether PW1 knows the meaning of telling the truth or lies before concluding that he is capable of promising to tell the truth and not lies.

I am of the understanding that the provisions of section 127(6) supersede the provisions of section 127(2). Section 127(6) reads:

> *"(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict,* ***if for reasons to***

> ***be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth****." (Emphasis added)*

In effect the provisions of section 127(6) put in place an overriding mechanism of receiving and treating the evidence of the child of tender age or victim of sexual offences by disregarding other preceding subsections of section 127 including subsection (2) subject to certain conditions. This was the position taken by the Court of Appeal in the case of **Wambura Kiginga (Supra)**, However, for section 127(6) to be applied in overriding section 127(2), the trial Court must record in the proceedings reasons as to its satisfaction that the child of tender years or the victim of the sexual offence is telling nothing but the truth.

In **Wambura Kiginga's case**, the Court of Appeal observed the following:

> *"Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The*

> *conditions are;* ***first, that there must be clear assessment of the victim's credibility on record and; second, the court must record reasons that notwithstanding noncompliance with section 127(2), a person of tender age still told the truth****." (Emphasis added).*

Upon scrutiny of the records, the trial Court did not record reasons as to its satisfaction that PW1 was telling the truth and not otherwise. Further, by way of extension of section 127(6) by the Court of Appeal in **Wambura Kiginga's case**, there is no assessment of PW1's credibility in the records. In that case, the argument raised by the learned Senior State Attorney with regard to section 127(6) fails.

For the above reasons, I expunge from the records the evidence of PW1. The next question for determination is whether there is other evidence to support the Prosecution 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 PW1 which has been expunged from the records, the remaining Prosecution's

evidence is incapable to prove unnatural 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.

KS Kamana

JUDGE

29/09/2022

Court: Judgment delivered in the presence of both parties.