IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 33 OF 2021

(*Originating from the Judgment of Temeke District Court, at Temeke in Criminal Case No 512 of 2019 before Hon. C.M. Madili, RM, dated 18/01/2021)*

ABDALLAH RASHID BAKARI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

6th December, 2021 & 18th February,2022.

E.E. KAKOLAKI, J.

In the District Court of Temeke, the appellant Abdallah Rashid Bakari was charged with and convicted of the offence of Unnatural Offence; Contrary to Section 154 (1) (a) of the Penal Code [Cap. 16 R.E 2002 now 2019]. It was alleged by the prosecution that on unknown date of the year 2019, the appellant had carnally knowledge of **BI** (name withheld to hide his identity) a boy of 10 years.

Brief story of the facts leading to the arraignment of the appellant as can be discerned from the records are that; on unknown dates and months but within the year 2019, in several occasions the appellant engaged **BI** (victim). It is said, he started by offering the victim (PW1) a ride to school using a motor vehicle (pick up) commonly known as ''kirikuu'' before he took him to two different places, at his home and a place with a lot of trees at Buza area where he sodomized him. Then he offered the victim small amount of money as a fair to return home. According to record it is claimed the appellant sodomized the victim three times on divers dates the act which shaken the victim's school attendance as he started missing the school programs before PW1's mother (PW2) was summoned at school where PW1 divulged the story to her mother and teachers. The information was reported at Buguruni Police station, where PW1 was issued with PF3 and examined by the doctor (PW3) at Amana Hospital before the matter was forwarded to Chang'ombe Police Station, the result of which was the arrest of the appellant at Gongolamboto his business place after being identified by PW1 who was in company of PW2 and the police officer PW4. Investigation was conducted by the investigation officer (PW1), where evidence was gathered including the PF3 (exhibit P1) which remarked that, PW1's has reduced anus sphincter, the result which

culminated into levelling the charges of Unnatural Offence; Contrary to Section 154(1) of the Penal Code against the appellant as shown above.

When the charge was read in court the accused denied the accusation, consequently the case proceeded to a full trial. During trial prosecution relied on evidence of five (5) witnesses and one (1) exhibit PF3 (exh. P1), while the defence side had three (3) witnesses. At the conclusion of trial, the trial magistrate found the appellant guilty of the offence charged with, convicted and sentenced him to 30 years imprisonment. Aggrieved with the decision of the trial court the appellant has preferred this appeal which is predicated on the following five (5) grounds of appeal:

1. That the learned Resident Magistrate erred in law and fact by not properly evaluating the weight of the prosecution evidence and reason wherefore he failed to reach a finding that the prosecution side failed to prove its case beyond all reasonable doubt in respect of both counts of which the appellant was convicted.
2. That, the learned Resident Magistrate erred in law and fact by conclusively finding that, the appellant is liable for an offence committed whereas there was no evidence to establish that fact.

3. That, the learned Resident Magistrate erred in law and fact by convicting the appellant in a case whom the victim has failed properly to identify the appellant and the scene of crime.
4. That, the learned Resident Magistrate erred in law and fact by convicting the appellant in a case where there was a variance between the charge and the evidence in the records.
5. That, the learned Resident Magistrate erred in law and fact by convicting the appellant in a case here PW2 evidence was procured without properly following legal procedure.

It is on account of the above grounds of appeal the appellant is praying this Court to allow the appeal, quash the conviction, set aside the sentence and set him free.

The appeal was disposed orally and both parties were represented as the appellant hired the services of Mr. Hashimu Mziray, learned advocate, while respondent enjoyed the service of Mr. Adolf Kisima, learned State Attorney.

Submitting in support of the appeal, Mr. Mziray started by praying the court to adopt all appellant's grounds of appeal to form party of his submission. He also prayed to condense the grounds of appeal by referring to the

evidence of PW2. According to him, PW2's evidence who is the victim was not sufficient enough to base conviction. He argued that, his testimony was taken in violation of section 127 (2) of the Evidence Act [Cap. 6 R.E 2019] which requires the child of tender age before giving evidence, to promise to tell the truth to the court and not to tell any lies. He contended that, when PW2 was testifying the trial magistrate found that he promised to tell the truth and not lies but did not state the base of his conclusion as no question was posed to the witness to satisfy this court whether the conclusion reached reflected the examination done to the witness by the court if any. Learned counsel Mziray referred the Court to page 20 of the typed proceedings and submitted that, there is evidence that PW2 being a minor during his preparation for testimony failed to disclose anything to the state Attorney concerning the case something which proves that it was necessary to conduct inquiry on him before he could start testifying. To buttress his point he cited to the Court the case of **Makelemo Rubinza v R**, Criminal Appeal No. 10 of 2020 (HC Unreported), at page 7, where the child of tender age testified without inquiry being conducted as per the requirement of the law and the Court held that, the same was fatal.

Counsel Mziray further argued that, PW2 did not identify the accused as the perpetrator of the offence when testifying nor did he mention him at the earliest possible time as seen at page 22 of the typed proceedings so as to assure the court that he is the one who sodomised him. According to him, even at police the victim (PW2) mentioned the appellant after being squeezed his fingers. On the importance of the witness to name the suspect/assailant at the earliest possible time he placed reliance on the case of **Marwa Wangai & Another Vs. Republic**, (2002) TLR 39 where it was held that, the ability of the witness to name the suspect at the earliest opportunity reflects importance of reliability of his evidence. That aside he submitted that; the age of PW2 was not disclosed so as to prove that he was of tender age. And lastly that, there was no material witnesses such as the victim's teachers to confirm to the court of what PW2 told them at school before he was taken to the hospital.

In response, Mr. Kisima resisted the submission by Mr. Mziray on the fact that the victim's age was supposed to be proved. He argued that, age is not mandatory in proving the offence of Unnatural Offence under section 154(1) of the Penal Code. He however notified the Court that, he was supporting the appeal basing on two grounds only, which are deficiency on identification

of the appellant and non-compliance of the trial court with section 127 (2) of the evidence Act. It was his submission that, after perusing the evidence of PW2, he noted that, the appellant was not identified by the victim in accordance with the law. He disclosed PW2 told the court that, he met the appellant several times at Buguruni area, and that appellant carried him in his car (Kirikuu) to Buza and sodomized him. But when asked the place where he was sodomized, he said could not remember. What the victim could remember is the place where appellant is selling oranges, and he pointed at the appellant without giving description of him first.

On the second ground Mr. Kisima submitted that, the law after amendment requires any child of tender age to promise to tell the truth and not lies before giving his testimony but in this case, the court made a finding without showing the base as to how it arrived to such finding that the witness (PW2) promised to tell the truth and not lies. To reinforce his argument he referred the court to the case of **Godfrey Wilson Vs. R,** Criminal Appeal No 168 of 2018 (CAT-unreported) where the Court of appeal articulated on the effect of non-compliance with section 127 (2) of the Evidence Act. The court in the said case expressed three ingredients to be established by the trial court

when conducting inquiry to satisfy itself whether the witness of tender age has promised to tell the truth and not lies as:

(i) Age of the child,

(ii) Religion of the child,

(iii) Whether she or he promise to tell the truth and not promise to tell lies.

According to the case of **Godfrey Wilson** (supra) he contended, the importance of these questions is to assist the appellate Court to ascertain as to how the trial court reached its conclusion. Non-compliance of these provisions vitiates proceedings and affect prosecution case, he submitted. In rejoinder Mr. Mziray had nothing more to add.

Having considered the arguments raised by the learned two legal minds and after critical perusal of the trial Court records it is obvious that determination of this appeal lies on the rationality or otherwise of the evidence of PW2, being the victim of sexual offence, thus the best witness. It is undisputed fact that at the time of giving his evidence PW2 was a child of tender age i.e under 14 years as provided for by section 127 (4) of the Evidence Act. As per the evidence of PW1 and PW2 himself at pages 18 and 21 of the typed proceedings respectively, in the year 2020 when testifying PW2 was 12 years, thus falling under the ambit of the definition of the child of tender

age. With that piece of evidence this court is unable to accept Mr. Mziray's submission that age of the victim was not proved since PW1 and PW2's evidence on that fact was never challenged by the appellant during cross examination.

Having found that when testifying PW2 was a child of tender age the next question is whether the trial court complied with the requirement of section 127 (2) of Evidence Act by establishing that he promised to tell the truth and not lies before giving his testimony. The said section 127(2) of Evidence Act reads:

> *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.*

Upon perusal of the record especially the testimony of PW2 as shown at page 21 of the typed proceedings, I tend to agree with the submissions by the learned legal minds that, there was non-compliance of the said provision. As alluded to the law requires that before the trial court arrives to the conclusion that the child witness has promised to tell the truth and not lies some questions are to be put to him/her first and recorded in the proceedings as were well articulated in the case of **Godfrey Wilson v R**, Criminal Appeal

No 168 of 2018, (CAT-unreported) 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 V The Republic**, Criminal Appeal No 274 of 2018 CAT at Mtwara.

What is seen in this case is the fact that the trial magistrate made a finding that, the witness PW2 promised to tell the truth and not lies without first putting to him the above proposed questions and have their answers thereto recorded. For easy of reference I find it beautiful to quote that part of the proceedings as shown at page 21 of the typed proceedings:

> *"**PROSECUTION CASE CONTINUE***
>
> *PW2: Laurent Chago, 12 years, student, Christian, Promises to tell the truth and not lies.*
>
> *Examination in-chief by SSA."*

One would note and I so find that, the trial magistrate illegally proceeded to receive evidence of PW2 without first complying with the provisions of section 127(2) of Evidence Act and conditions as set out in the case of **Godfrey Wilson** (supra). The effects of non- compliance with the provisions of section 127 (2) of Evidence Act (supra) were well articulated in a number of cases including the case of **Yusuph Molo vs. Republic**, Criminal Appeal No. 343 of 2017, (CAT-unreported) 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)*

In light of the above cited authority, I am at one with both learned counsels that, contravention of Section 127 (2) of Evidence Act by the trial court in this matter is fatal and affected evidential value of PW2's evidence, the result of which is to expunged his evidence from the record, which course I hereby take and order accordingly.

Having expunged from the record evidence of PW2, the next question is whether there is other prosecution evidence to support prosecution case on the charge of **Unnatural Offence** against the appellant. Indeed I find none since the evidence of PW1 and other prosecution witnesses' evidence is not direct evidence for not witnessing the appellant committing the offence to PW2 nor does it constitute circumstantial evidence. As the appellant's conviction relied much on the evidence of PW2 which is already expunged,

I find the prosecution case against the appellant to be hanging as the same is not proved beyond reasonable doubt. I therefore find the appellant's condensed grounds of appeal to have merits.

For the fore stated reasons this court is enjoined to allow appeal which course I hereby take and do accordingly. The appellant's conviction is therefore quashed and his sentence set aside. I order that, the appellant be set at liberty unless otherwise lawful held.

It is so ordered.

E. E. KAKOLAKI
JUDGE
18/02/2022.

Judgment delivered at Dar es Salaam in chambers this 18th February, 2022 in the presence of the Appellant in person and Ms. Monica Msuya. Court clerk and in the absence of the Respondent.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
18/02/2022.