IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 4 OF 2022

(Originating from the decision of the District Court of Temeke at Temeke, in Criminal Case No. 566 of 2019, by Hon. Ndossy-RM dated 9th day of November, 2020)

YUSUPH SAID..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

14th February, 2022 & 16th February, 2022

ISMAIL, J;

This appeal arises from the decision of the District Court of Temeke at Temeke, in which the appellant was arraigned and convicted of committing an unnatural offence, contrary to the provisions of section 154 (1) (a) of the Penal Code, Cap. 16 R.E. 2019. The offence was allegedly committed on diverse dates in 2019, whereupon the appellant allegedly had a carnal knowledge of ABC (in pseudonym), a boy of 10 years of age, against the order of nature. The appellant pleaded not guilty to the

charges, necessitating conducting of trial that culminated in the conviction and sentence.

The victim of the incident (PW2 in the trial proceedings) identified his tormentor, the appellant, by the name of Mzee Manguruwe, with whom they lived along the same street at Temeke Mikoroshini, in Temeke. He testified that on the first day of the series of the disturbing incidents, he was sent to call a boy called Fahad. Along the way, he met the appellant who called and offered to give him a chicken. He took him into the house where he told the victim to undress and ordered him to bend forward. He then forced his penis into the victim's anus. After he was done, he ordered him to dress and go, with a stern warning that he would kill him if he disclosed the incident to anybody. This was repeated on a few other occasions, until the victim decided to share it with his friend at school. The latter, PW3, disclosed it to his teacher who took the matter with the victim's parents, one of whom was PW1, who reported the matter to Mamboleo A police station. They were referred to Chang'ombe police station where a Police Form No. 3 (PF3) was issued for the victim's medical examination. PW5, read the PF3 (Exhibit P1) filled by Dr. Kalanga who examined the victim but died before he testified. The examination found that the victim's anus was loose, suggesting that he had been molested.

PW4 completed her investigation and concluded that the evidence was credible enough to warrant commencement of criminal proceedings against the appellant. The trial court conducted the trial and found that the appellant had a culpable role. He was convicted and sentenced to life imprisonment, a verdict did not go well with him, hence his decision to institute an appeal to this Court. Six grounds of appeal have been raised as paraphrased hereunder:

One, that the appellant's conviction was grossly erred as it relied on the testimony of PW2, while there is no evidence that PW2 promised to tell the truth and lies. ***Two***, that the trial court erred in relying on the testimony of PW1, PW3, PW4 and PW5 as a corroboration of PW2's testimony while the corroborating evidence was contradictory, unreliable, incredible and inconsistent. ***Three***, that the trial court grossly erred in law by relying on the testimony, of PW5 who was not listed in the list of witnesses for the prosecution. ***Four***, that the trial court grossly erred in law and fact by convicting the appellant of unnatural offence, while PW2 failed to establish commission of the said offence. ***Five***, that the trial court erred in passing a sentence that did not consider age of the victim (PW2). ***Six***, that the trial court erred in law in holding that the prosecution evidence has proved its case to the required standard.

When the matter came up for hearing, Ms. Jackline Werema, learned State Attorney who represented the respondent, rose to address the Court on what she considered to be an anomalous conduct in recording the testimony of PW2. Her submission was in relation to ground one of the petition of appeal. Her contention is that the requirements of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019 were not complied with. This is in view of the fact that no semblance of a process was conducted to test the competence of PW2, a child of tender age, to know the importance of telling the truth, and promising that he would tell the truth and no lies.

Ms. Werema contended that this was a fatal anomaly whose consequence is to render the testimony worthless, liable to being expunged from the record. She bolstered her argument by citing the decision of the Court of Appeal of Tanzania in ***Japhari Majani v. Republic***, CAT-Criminal Appeal No. 402 of 2019 (unreported). Learned counsel further argued that, after expunging the testimony of PW2, the rest of the testimony is a bunch of hearsay evidence which is of no evidential value.

She urged the Court to allow the appeal and set the appellant free.

The appellant had nothing to submit, other than registering his appreciation to and concurrence with what respondent's counsel submitted. He prayed that his appeal be allowed.

The crucial issue to be determined is whether the testimony of PW2 was marred by the irregularity that renders it ineligible.

As Ms. Werema rightly submitted, whenever the testimony of a child witness of tender age is intended to be adduced in court, the adduction must conform to the requirements set out in section 127 (2) of Cap. 6. This is a provision that has undergone some amendments which dispensed with the requirement of *voire dire,* hitherto enshrined in section 127 (2) and (3) of the said Cap. 6, introducing, in its stead, the requirement of having the child witness give a promise of telling the truth and no lies. This new dispensation provides as follows:

> *"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 tell lies."*

This position has been underscored in a host of court decisions which include the case of ***Selemani Moses Sotel @ White*** CAT-Criminal Appeal No. 385 of 2018 (unreported). In the earlier decision of ***Msiba Leonard Mchere Kumwaga v. Republic***, CAT-Criminal Appeal No. 550 of 2015 (unreported), the Court of Appeal of Tanzania observed as follows:

"... Before dealing with the matters before us, we have deemed it crucial to point out that in 2016 section 127 (2) was amended vide Written Laws Miscellaneous Amendment Act No. 4 of 2016 (Amendment Act). Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies."

In the instant matter, the trial magistrate was alive to the fact that PW2, the alleged victim of the incident was a child of 10 years of age. He was also cognizant of the fact that the law requires that such witness should give a promise of telling the truth before he testifies. This fact is discerned from the court's description of the said witness where, after identification of witness's name it was recorded as follows:

"..... 11 years, Temake Mambolea A, a student at Vetenary Primary School in std V, Muslim the (sic) promises to tell the truth and state as follow (sic),"

As the trial magistrate did that, little did he know that he ought to have gone a step further and carry out a process which would ascertain if the said witness had the requisite appreciation of what it entails to tell the truth. While it is appreciated that the statutory provision did not give a known procedure on how the said test is to be conducted, case law has provided an invaluable guidance on how it should be done. This void was

filled by the Court of Appeal's decision in ***Geoffrey Wilson v. Republic***, CAT-Criminal Appeal No. 168 of 2018 (unreported), wherein it was guided 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).

As stated earlier on, in the trial proceedings that bred the instant appeal, this imperative requirement was given a wide berth and, as Ms. Werema submitted, the net effect is to subject the testimony of PW2 to obliteration, and I have no hesitation in ordering that the said testimony be expunged from the record of the trial proceedings.

Having done so, my assessment of the residual testimony paints a gloomy picture that has convinced Ms. Werema to urge this Court to hold that the same is acutely insufficient to support the appellant's conviction. This is mainly because, such testimony is merely a third party account which was meant to corroborate PW2's testimony. In the absence of the primary testimony, that which was to support it becomes worthless and of no consequence.

In the upshot of all this, I hold that ground one of the appeal is meritorious and I allow it. This sufficiently disposes the appeal in the appellant's favour. Accordingly, I quash the trial proceedings, set aside the conviction and sentence, and order that the appellant be immediately released from prison unless he is kept for some other lawful reasons.

It is so ordered.

Rights of the parties have been duly explained.

M.K. ISMAIL,

JUDGE

16/02/2022

DATED at **DAR ES SALAAM** this 16th day of February, 2022

M.K. ISMAIL,

JUDGE

16/02/2022