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. 258 OF 2022

(Originating from the decision of the District Court of Rufiji at Utete, in Criminal Case No. 49 of 2020, by Hon. Maximilian-RM dated 29th day of March, 2021)

MANZI BAKARI MTIGINO ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

2nd & 9th May, 2022

ISMAIL, J;

The appellant was arraigned in the District Court of Rufiji at Utete, facing a charge of rape. The contention by the prosecution is that, on 23rd March, 2020, the appellant had a carnal knowledge of ABC (in pseudonym), a girl of 13 years of age. The incident is alleged to have occurred at about 20:00 hours at Central Umwe village, Rufiji District in Coast Region.

Gleaning from the proceedings of the trial court, the victim (PW1) was a class four student who also attending Islamic teachings given by the appellant. On the fateful night, PW1, who used to sleep at PW4's home, was

in the house. She went to a nearby room to collect a mattress she sleeps on. As she did that, a person that she identified as the appellant appeared, covered her mouth with a bed sheet and dragged her into his room. He removed her under pant and raped her. Her screaming would not be of any help as PW4's mother raised the volume of her radio.

Subsequent to the incident, the appellant located PW1 and pleaded with her not to report the incident to anybody. Her cash offer did not sway PW1 who eventually revealed the incident, after which the matter was reported to the hamlet chair who informed the police. A PF3 was issued to allow for medical examination, carried out by PW6. The examination revealed that PW1, who had trouble walking and was bleeding, had been carnally known. Investigations led to arraignment of the appellant and, on trial, he was convicted and sentenced to imprisonment for 30 years. Unhappy with the conviction and sentence, the appellant preferred the instant appeal which contains seven grounds of appeal. However, for reasons that will be apparent shortly, the said grounds will not be reproduced.

When the matter was called on for hearing, the appellant was represented by Mr. Nickson Ludovick, learned counsel, while Ms. Laura Kimario, learned State Attorney, represented the respondent. Both counsel addressed the Court on the grounds of appeal, but without any disrespect

to Mr. Ludovick's fabulous submission, it is the submission of Ms. Kimario that I consider to be most relevant, and I will make a summary of it.

In her submission, Ms. Kimario expressed her support to the appeal. Singling out ground one of the appeal, learned Attorney argued that, though conducting of *voire dire* is no longer a requirement, the testimony of PW1 did not comply with the requirements of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019, which requires a child of tender age to give a promise to tell the truth and no lies, before he or she testifies. She cited the decision of the Court of Appeal of Tanzania in ***Godfrey Wilson v. Republic***, CAT-Criminal Appeal No. 168 of 2018 (unreported). In this case, such requirement was not followed. It is in view of this anomaly that she urged the Court to expunge PW1's testimony.

Ms. Kimario further submitted that, having expunged PW1's testimony, the remainder of the prosecution's testimony has corroborating effect as it is a hearsay account which makes it inadmissible. She, in consequence, urged the Court to allow the appeal, set aside the conviction and sentence and set the appellant free.

The submission by Ms. Kimario was supported by Mr. Ludovick who was also in agreement that the ultimate consequence in such a case is to allow the appeal and order that the appellant be set at liberty.

From the parties' concurrent submissions, the only issue for determination is whether the prosecution's testimony suffers from the deficiency pointed out in the submissions.

Addressing the question of *voire dire*, it is correct, as Ms. Kimario submitted, that the law on *voire dire* has since undergone some changes and the position, as it currently obtains, is that a child witness is only required to give a promise of telling the truth and no lies, before he or she testifies. The relevant provision states 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."*

Confirming this position was the decision of the Court of Appeal in ***Selemani Moses Sotel @ White*** CAT-Criminal Appeal No. 385 of 2018 (unreported), which quoted its earlier position in ***Msiba Leonard Mchere Kumwaga v. Republic***, CAT-Criminal Appeal No. 550 of 2015 (unreported), wherein it held hereunder:

> *"... 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."

A glance at the trial proceedings in the instant matter reveals that PW1, whose testimony appears at pages 9 through to 12 was aged 13 years when she testified. Her testimony was adduced without going through the mandatory ritual of having to establish if she appreciates the importance of telling the truth, and making an undertaking of telling the truth and not lies. In its stead, the trial magistrate affirmed her and let her testify. This implies that this testimony was taken and formed the basis for the finding without any assurance that what constituted PW1's testimony is the truth without any possible falsehoods.

Clearly, this was an infraction that renders the testimony lacking in any evidential value and liable to expunging from the prosecution's testimony. I have no hesitation in acceding to the unanimous call made by both counsel. Inspired by numerous decisions, including the decision in ***Geoffrey Wilson v. Republic***, CAT-Criminal Appeal No. 168 of 2018 (unreported), I hereby expunge the testimony of PW1 from the record.

After getting PW1's testimony out of the way, what follows next is the assessment of the remainder of the testimony. My unfleeting review of this testimony reveals that, save for the testimony of PW6, the rest of the

testimony is a third party account, known as hearsay evidence. This is the kind of evidence which cannot, by itself, support the charge of rape. If anything, the same had a corroborating effect to the testimony of PW1 which has since been chalked off. The testimony of PW6 is unable to put any blemished impact on the appellant.

The net effect of all this is that the prosecution's case was not proved beyond reasonable doubt. It follows that the appellant's conviction and eventual sentence was a serious travesty of justice.

Consequently, as I allow this appeal. I quash and set aside the conviction and sentence imposed by the trial court, and order that the appellant be immediately set free, unless held for other lawful reasons.

Order accordingly.

Rights of the parties have been duly explained.

M.K. ISMAIL

JUDGE

09/05/2022

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

M.K. ISMAIL,

JUDGE

09/05/2022