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. 177 OF 2022

(Appeal from the decision of the District Court of Temeke at Temeke in Criminal Case No. 468 of 2021 Hon. Madili, RM, dated 24th of August, 2022.)

CHRISTRIAN GOLDEN MWALUKOMO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 14th December 2022

Date of Judgment: 28th February, 2023

POMO, J.

Christian Golden Mwalukomo, the appellant herein, was arraigned before the District Court of Temeke at Temeke facing a charge comprising of two counts, namely; rape contrary to section 130 (1) (2) (e) and 131 (1) of Penal Code, Cap 16 R.E 2019 and unnatural offence, contrary to section 154 (1) (a) and (2) of the Penal Code *(supra).* The contention by the prosecution at trial was that the two offences were committed on unknown date and month of 2020 at Mbagala Zakhem within Temeke District, in Dar

es Salaam Region. The victim of the alleged acts was C (in pseudonym), an eleven years old girl.

The factual setting of the matter that bred this appeal is quite straight forward. On the fateful day, the victim (PW1) and her cousin of 4 years old, were left by the victim's aunt playing outside and the victim's cousin felt thirsty thus he needed water to drink. The victim in the course of looking for water, went to the appellant who is the neighbour and it was alleged that, the appellant dragged the victim into his room while her cousin was outside, bended her facing the bed, laid her on his bed and sodomized her.

It appears that the fact was never known to anyone until when the victim was caught at school doing sexual intercourse with her fellow and when asked by the teacher if she had done it before, the victim mentioned the appellant and narrated on how it happened. The headmaster decided to call the victim's father Yasin Abdi Nkya who was featured as PW2. His testimonial version was to the effect that, he was narrated on the manner on how his daughter was caught doing sex with her fellow and how she came to mention their tenant (the appellant). PW2 took the victim to the Kizurian police station where she was given a PF3 and she was then sent to hospital where she was attended by PW3, one Ada Lawas. According to PW3; he was the one who diagnosed her and found the vagina was not intact and

the anus had bruises and open. The whole case was investigated by PW4 One W7 432 Detective Anna and she had interrogated all the witnesses.

The appellant was apprehended and taken to the Police Station where investigation was carried. The investigation drew the conclusion that the appellant was culprit of the incident he was accused of. He was arraigned in court and pleaded not guilty to the two charges. The consistent message in his defence testimony was that he is a Christian and he has a woman and insisted he never had such desires which can lead him to do the alleged conducts. This was supplemented by his neighbour one Willium Joseph Ngula who was featured as DW2. Besides, the appellant also had called his lover, one Jenipher Nzengo to testify as DW3 whom actually narrated on how the appellant was arrested and defended the appellant that the environment surrounding them, could not be easy for the appellant to commit such offences as there is movement of people at the scene.

After a trial that saw the prosecution paraded four witnesses against three for the defence, the trial court concluded that guilt of the appellant had been established for the second count but not the 1st Count, henceforth the trial magistrate acquitted the appellant for the 1st count. The trial Court went ahead and convicted him and imposed a sentence of life imprisonment and compensation to the victim at a tune of TZS. 500,000/=.

The conviction and sentence rattled the appellant, hence his decision to institute the instant appeal. Six grounds of appeal have been raised but in essence the appellant's grievance are premised on the following; ***One,*** *there was procedural irregularity for non-compliance with section 127 (2) of the Tanzania Evidence Act,* ***Two,*** *the trial Court erred to rely on the evidence of PW1 who was not credible,* ***Three,*** *the defence evidence was never considered,* ***Four****, the trial magistrate denied the appellant's right to be heard*

In arguing the appeal, the appellant fended for himself whilst the respondent was represented by Ms. Dorothy Massawe, learned State Attorney. The hearing was conducted by way of written submissions to which the parties have filed their respective submissions however, I have observed a fascinating aspect to which I see it apt to take it into board before even proceeding with determination of this appeal on merit. Basing on the Court's record, when the matter stood for hearing on 14th December, 2022, it was the parties' consensus prayer that the matter be disposed by way of written submissions. Upon the Court sanctification of their prayer, it made an order to which, the appellant's submission in chief was to be filed on or before 23th December 2022, respondent's reply submission on or before 02nd January

2023, rejoinder (if any) on or before 09th January 2023 and Judgement on 16th February, 2023.

Upon keen perusal to the records, contrary to the afore mentioned order, I have noticed that the rejoinder by the appellant was filed on 25th January, 2023. This Court and the Apex Court have time without number underscored compliance to Court orders that, a court order is binding and Court orders are made in order to be implemented. See; **Tanzania Harbours Authority v. Mohamed R.** [2002] TLR 76; **Patson Matonya v. Registrar Industrial Court of Tanzania & Another**, CAT-Civil Application No. 90 of 2011; and **Geofrey Kimbe v. Peter Ngonyani**, CAT-Civil Appeal No. 41 of 2014 (DSM-unreported).

Therefore, the fact that the appellant had decided to file his rejoinder out of time contrary to the order of this Court without leave of this Court, I therefore proceed to expunge the appellant's rejoinder from the record. Thus, I will only consider the submissions filed timely by the parties.

Embarking to the appeal, in respect of *ground one*, the appellant submitted that, nothing shows that the trial Court did an assessment before PW1 (a child of tender age) gave her promise to tell the truth and not lies. It was the appellant's argument that, according to section 127 (2) and (3) of the Evidence Act, [Cap 6 R.E 2022], the trial Court was supposed to test

the child intelligence and then make the child promise to tell the truth but this was not done. To bolster his preposition, he cited the case of **Godfrey Wilson vs. The Republic**, Criminal Appeal No. 168 of 2018, CAT at Bukoba (Unreported). He further stressed that, in the proceedings, the child was not asked whether he understood the nature of oath and if she made a promise not to tell lies. The appellant went on to pray that, the evidence by PW1 be expunged and thus, there is no any remaining sufficient evidence to justify conviction of the appellant.

In respect of *the second ground of appeal,* the appellant argued that, PW1 was not a credible witness as she gave improbable and implausible evidence. According to him, during examination in chief she said she had forgotten the date and month of the incident but it was 2020 however, in cross examination she changed her story that the incident occurred at noon time on Saturday. Besides, he contended that it was unthinkable and illogical for a child of 1 years to bear a man hood of an adult person on first incident without affecting her walking status for her parents, neighbours and teachers to detest.

Another complaint (3rd ground) was that, the trial Court did not consider the defence case. It was the appellant's argument that, there was non - compliance to section 312 (1) of the Criminal Procedure Act which

requires proper evaluation of evidence of both sides. According to him, the trial Court only summarized the appellant's evidence but did neither consider nor analyzed the defence evidence. For that reason, he contended it to be a fatal irregularity. To bolster his preposition, he cited the cases of **Hessein Idd and Another vs. The Republic,** [1986] T.L.R 166, **Alfeo Valentino vs. The Republic**, Criminal Appeal No. 92 of 2016 and **Yasin Mwakapala vs. The Republic,** Criminal Appeal No. 604 of 2015.

On the 4th complaint was that, the trial magistrate did ask questions to DW2 and DW3 while testifying in chief instead of let them narrate their stories. According to the appellant, this violated a right to be heart for the appellant as enshrined under Article 13 (6) (a) (ii) of the Constitution of the United Republic of Tanzania of 1977. Basing on these, the appellant prayed the appeal be allowed.

On the other hand, in respect of ground one the learned state attorney briefly submitted that, the Court dully assessed the credibility of PW1 (the victim) as provided by section 127 (2) of Evidence Act and PW1 went on to promise to tell the truth and not lies before she gave her testimony. Thus, it was the respondent's submission that there was compliance.

On the second ground, it was the submission of the learned state attorney that, PW1 was a credible witness and the trial Court could rely upon

her. It was urged that, for her to forget the date and month is possible considering the lapse of time, her age and thus when cross examined as she said the incident occurred in Saturday does not change the story. As to the issue of having sex with the victim and without changing her working state, the learned state attorney insisted that, it is immaterial as in sexual offences, the best evidence comes from the victim. To support, she cited the case of **Selemeni Makumba vs. Republic**, [2006] T.L.R 379.

On the third ground, the learned counsel for the respondent conceded that the defence was never considered by the trial Court and she insisted that this Court has to step into the shoes of the trial Court as directed in various cases and mentioned one of **Siaba Mswaki vs. Republic**, Criminal Appeal No. 401 of 2019 (Unreported).

On the fourth ground, the learned state attorney did not reply specific to the ground but rather he succumbed in generality that the case against the appellant was proved beyond reasonable doubt. His submission was to the effect that, PW1 who was the victim informed the trial Court that appellant inserted his penis on her anus, her evidence was corroborated with the evidence of the doctor (PW3) and PF3 (Exhibit P1). Thus, according to her, the offence of unnatural offence was proved beyond reasonable doubt.

I have gone through the record of the trial proceedings together with the parties' rival submissions. The issue that comes out for resolution is whether the present appeal is meritorious.

To address the first ground of appeal, I am convinced to enlighten the following observations;

One, as per the sanctity of the trial court's records, the only prosecution witness who is the eye witness, was the victim herself. It is a well settled principle of law extended by the Court of Appeal of Tanzania in a recent decision of **Majaliwa Ihemo vs. Republic,** Criminal Appeal No. 197 of 2020 (Unreported) that the best evidence in sexual related trials to be that of the victim however it has to be credible and reliable enough to justify conviction. In that case, at **page ;** the Court of appeal had this:-

> *"…In* ***sexual related trials, the best evidence is that of the victim*** *as per our decision in* ***Selemani Makumba vs. R****, [2006] TLR 379.* ***We however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like credibility of the prosecution witnesses, reliability of their evidence***

and the circumstances relevant to the case in point..." [Emphasis added]

Basing on the above preposition, in this case, since at the time of the alleged offence the victim was alone with the appellant, it is critical that her credibility is impeccable, faultless and her evidence completely reliable.

Upon keen perusal to the evidence by PW1 in a process of verifying on the credibility and reliability of her evidence; as contended by the appellant, I have noticed a crucial defect which is so vital to affect the worth of her testimony. The same is positioned on the manner on how the evidence of PW1 was procured.

Technically, the PW1 testimony is particularly governed by section 127 (2) of the Evidence Act (TEA), Cap 6 RE: 2019. Principally the said provisions entails that a child of tender age before giving evidence, she/he must promise to tell the truth to the court and not to tell a lie. The section reads: -

"127 (1) .....

(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 lies."

] For my understanding, the above cited provision provides for two conditions; one, it allows the child of a tender age to give evidence without oath or affirmation. Two, before giving evidence such a child is mandatorily required to promise to tell the truth to the court and not to tell lies.

As the records stands it appears that PW1 promised to tell truth however the manner on how she came to make such a promise isn't revealed. It is apparent in record that the trial magistrate did not show how the promise was made. This is evidenced at page 8 of the typed proceedings when the evidence of PW1 was recorded as follows: -

"Examination in chief by S/A
PW1, Mariam Yasin Nkya*, age 12 years, resides in Zakhem, student at Mchikichini Primary School*
Section 127 of EA complied with, witness promise to tell the truth and not lies before the Court
I live in Zakihem with my father, grandfather and mother.
I study at Mchikichini Primary School and standard seven."

It is the condition precedent before the child promises to tell truth and promises not to tell lie, that a child witness has to first pass at a stage whereby, a trial magistrate can ask him/her the simplified questions.

In essence, the process had been well articulated in the case of **Godfrey Wilson vs. Republic** *(supra)*, where at page 13-14 the Highest Court of the Land had this to say;

> *"The trial court 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 tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is the condition precedent before reception of the evidence of a child of 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."*

In the instant case, the trial magistrate failed to indicate the nature of questions posed to PW1 (a child of tender age) so as to appreciate the rational answers given by her and that he failed to articulate as to whether PW1 understood the duty to speak the truth to justify the receipt of her evidence. Thus, some sorts of questions to arrive at the stage of making such promise were never reflected in the proceedings, there is no gainsaying that the required procedure was not complied with before taking the evidence of the victim. Basing on such shortcoming, I think that her evidence was not properly admitted in terms of section 127 (2) of TEA. Hence the same has no evidential value.

Undoubtably, since the crucial evidence of PW1 who is the eye witness being tainted with such discrepancies, the question I am asking myself is whether, the evidence remained intact can justify conviction of the appellant? I believe the answer is negative as the nature of evidence is such of corroborative nature which relies on the words presaged by PW1. Thus, the remaining evidence in record is so weak which cautiously the respondent did not prove the charge against the appellant beyond reasonable doubt. I therefore see no reason to delve into other grounds of appeal.

In the event, the appeal is allowed, both the conviction and sentence meted out against the appellant are hereby quashed and set aside. I further

order that the appellant be released forthwith from the prison custody unless held for some other lawful orders.

It is so ordered.

Rights of the parties have been explained.

DATED at **DAR ES SALAAM** this 28th day of February, 2023.

MUSA K. POMO

JUDGE

28/02/2023