IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 143 OF 2022

KELVIN SADICK OMARY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Temeke at Temeke in Criminal Case No. 241 of 2021)

JUDGMENT

2nd and 28th February, 2023

KISANYA, J.:

In the District Court of Temeke at Temeke, the appellant was arraigned for the offence of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E, 2019 (now R.E. 2022).The appellant was alleged of having committed the offence on diverse dates between July, 2020 and August, 2020, at Tuangama Pande area within Temeke District in Dar es Salaam Region, against an girl aged 11 years old. For the purposes of disguising her identify, I shall refer to the girl as the victim or PW1.

In order to prove the charge, the prosecution called four witnesses including the victim who testified as PW1. Other witnesses were PW2 Salma

Kaburu, the victim's aunt; PW3 Abdallah Ally Makondo, a doctor of Vijibweni Hospital who attended the victim; and PW 3539 D/SGT Grentina, a police officer who investigated the matter. On the other side, apart from the appellant who testified as DW1, the appellant lined up as witnesses, DW2 Chrispin Steven Mtete, who happened to be his uncle; DW3 Elizabeth Steven Damian who is the victim's grandmother and DW4 Yustina Thobias, accused's mother.

At this juncture, I find it appropriate to give a brief background of the case as deduced from the record. The victim was living with her grandmother at Tuangoma Kigamboni, Dar es Salaam. Others in that house were the appellant and his wife. In 2020, the victim's grandmother travelled. The appellant started entering the victim's room. It is alleged that he sodomized the victim five times and that the appellant's wife recorded the event. The victim stated to have told her grandmother who failed to take the necessary measure to avoid family conflict. It was on 18th May, 2021 when the victim unveiled that fact to her step mother (PW2) when the latter found stool in the victim's tight and underwear.

The matter was then reported to Police Station and the appellant was arrested. On 20th May, 2021, the victim was then taken to Kisiwani hospital where she was attended by PW3 and one Amina. Upon examining the victim,

PW3 opined that her anus was loose due to penetration of a blunt object. The said finding was filled in the Medical Examination Report–PF3 which was admitted in evidence as Exhibit P1. On her part, PW4 testified how she investigated the matter.

In his defence, the appellant distanced himself from the offence. He testified that the offence was committed when he was living with Chrispin Mtete at Majumba Sita. The appellant stated to have moved to Tuangoma in January, 2021, together with his wife and their child. It was his contention that the case was fabricated against him by the victim's father. As stated earlier, his evidence was supported by DW2, DW3 and DW4.

At the end of the trial, the trial court decided that the prosecution had proved the charge laid against the appellant. It convicted the appellant of the offence of unnatural offence and sentenced him to life imprisonment.

Aggrieved by the conviction and sentence, the appellant appealed to this Court on ten ground of appeal. On the account of what will be unveiled later, I shall reproduce the first ground only. It is to the following effect:

> *"The trial court misdirected itself by convicting the appellant relying on evidence of the victim (PW1) of tender age without considering that the same was recorded contrary to section 127 (2) of the Evidence Act, Cap 6, R.E. 2019; as it*

failed to examine the child witness as to test her competence and know whether she understood the meaning and nature of an oath before she promised to tell the truth and not to tell lies."

At the hearing of the appeal, the appellant appeared in person unrepresented, while the respondent Republic was represented by Doroth Masawe, learned Principal State Attorney.

On taking the floor, the appellant opted to adopt his written submission to form part of his submission.

Replying, Ms Masawe supported the appeal basing on the first ground of appeal. She submitted that the evidence of PW1 was recorded in contravention of section 127(2) of the Evidence Act. Her argument was founded on the ground that the learned trial magistrate did not make an inquiry as to whether the victim knew the nature of oath and whether she promised to tell the truth. In view of the said omission, the learned State Attorney was of the firm view that evidence of PW1 is a nullity. It was her further contention that, in the absence of evidence of PW1, there remains no evidence to prove the charge laid against the appellant. To cement her argument, she cited the case of **Godfrey Wilson vs R**, Criminal Appeal No. 168 of 2018 (unreported). In conclusion, the learned

State Attorney urged that the prosecution did not prove the charge beyond reasonable doubt.

The appellant had nothing to rejoin after hearing the learned Principal State Attorney. He just asked the Court to discharge him.

After considering the first ground of appeal and the submission by the appellant and the learned Principal State Attorney, the issue for determination is whether the evidence of PW1 was properly recorded.

It is common ground that the victim was a child of tender age. According to section 127(2) of the Evidence Act, the court must be satisfied that a child of tender age is incapable of giving evidence on oath or affirmation, before making him or her promise to tell the truth to court and not to tell lies. There is a number of decisions which have interpreted the said provision. These include, **Godfrey Wilson** (supra), **John Mkongoro James vs R**, Criminal Appeal No. 428 of 2020 (unreported) and **Faraji Said vs R**, Criminal Appeal No. 172 of 2018 cited by the parties. In another case of **Salum Nambaluka vs. R**, Criminal Appeal No. 272 of 2018 (all unreported), the Court of Appeal held that:

> *"The provision enjoins trial courts when dealing with children of tender age as witnesses, to still conduct test on such children to test their competence. It is unthinkable that*

s. 127 (2) of the Evidence Act can be blindly applied without first testing a child witness if he does not understand the nature of an oath and if he is capable of comprehending questions put to him and also if he gives rational answers to the questions put to him."

In the instant appeal, the trial court recorded that the victim promised to tell the truth and not lies. However, the trial court did not satisfy itself on whether the victim understand the nature of oath and capable of comprehending questions put to him. An inquiry to such effect ought to have been reflected in the proceedings. As rightly submitted by the appellant and the learned Principal State Attorney, the said irregularity is fatal. It vitiated the evidence of PW1. Being guided by the recourse taken in **Ramson Peter Ondile vs R**, Criminal Appeal No. 84 of 2021, I hereby discard PW1's evidence from the record.

Having expunged PW1's evidence, I agree with Ms. Masawe that the remaining evidence is not sufficient to sustain the appellant's conviction. This is because the evidence of PW2 is hearsay, whereas evidence of PW3 and PW4 did not prove the perpetrator who assaulted the victim. As the first ground is sufficient to dispose of the appeal, I find no need deliberating on the other grounds of appeal.

For the foregoing reasons, I allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. Consequently, I order for immediate release of the appellant from prison unless he is held there for other lawful cause.

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

S.E. KISANYA
JUDGE
28/02/2023