IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL N0. 131 OF 2023

(*Appeal from the decision of the District Court of Mkuranga at Mkuranga, given before (Hon. R.E MWAISAKA -SRM) dated on the 14th day of December 2022 Originating from Criminal Case No. 265 of 2022)*

ISSA ATHUMANI MAGANDI..... APPELLANT

VERSUS

THE REPUBLIC..... .....RESPONDENT

JUDGMENT

MKWIZU, J:

The Appellant Issa Athumani Magandi was arraigned before the District Court of Mkuranga at Mkuranga with an offence of Unnatural Offence contrary to section 154(1) of the Penal Code [Cap 16 R: E 2019]. The particulars of the offence were that on the 5th day of June 2022 at Bigwa area Mwarusembe village within the District of Mkuranga in Coast region, the accused person did have carnal knowledge of JFM (victim) a boy of five years old against the order of nature. Upon a full trial, he was found guilty, convicted, and sentenced to life imprisonment.

The appellant is aggrieved. He now appeals to this Court against both conviction and sentence on five grounds of appeal challenging the trial court decision for being grounded on uncredible visual identification

evidence of PW2 recorded in contravention of section 127(2) of the Evidence Act [Cap 6 R: E 2022]; that his conviction is grounded on contradictory and uncorroborated evidence, non-observance of the provision of section 214(1) of the Criminal Procedure Act, [Cap 20 R: E 2019] and lastly for failure by the prosecution to prove the case beyond a reasonable doubt.

At the hearing of the appeal, the appellant was in person without legal representation, while the respondent/ Republic, was represented by Ms Gloria Simpasa learned State Attorney.

With the leave of the court, the appeal was disposed of by written submissions. The appellant's contention in his written submissions was that visual identification evidence relied upon to ground the conviction was incredible and unreliable. He said, according to the records, the offence was committed during nighttime, but the prosecution evidence was given without details on what aided what was presented to be the unmistaken identification like the proximity of the identifying witness to the accused, the source of light, and its intensity. He urged the court to find that the identification evidence by PW2 at the scene of the crime was not watertight enough to warrant the appellant's conviction.

The appellant's second grievance was directed to the manner PW2's evidence was recorded. He said, PW2 was a witness of tender age whose evidence was received in contravention of section 127(2) of the Evidence Act. He said, in this case, the trial court jumped to the conclusion that the witness had promised to tell the truth to the court and not to tell lies, without *first examining the* witness as to whether he understood the meaning and nature of an oath or not. He relied on **John Mkorongo**

James Vs R, Criminal Appeal No. 498 of 2020 pressing to the court to find PW2 valueless. He in conclusion left the 4th grounds of appeal for the court determination with a prayer to the court to quash the conviction set aside the sentence and set him at liberty stressing that the case was not proved to the required standard.

On her part, the learned State Attorney admitted that PW2 was not led to speak on the source of light and proximity, but she was of the view that the appellant was a person familiar to the witness before the incident and according to the nature of the offence, the proximity between the Appellant and PW2 is impliedly close. She in addition submitted that the identification was by recognition thus there was no room for a mistaken identity.

The learned State Attorney was keen to admit that on page 7 of the trial court's proceeding, the trial magistrate did not enlist the questions posed to the witness, PW2, it simply stated that PW2 has been addressed in terms of Section 127(2) of TEA and has promised to speak the truth and not lies, and was of the view that the provisions of section 127(2) of the Evidence were complied with.

Responding to ground three of the appeal, the learned State Attorney said, the alleged contradiction in the prosecution case is minor and does not go to the root of the matter. She on this relied on the cases of **Daniel Wasonga Vs R**, Criminal Appeal No. 64 of 2018(CAT at Mwanza), that:

> "Contradiction by a witness or between witnesses is something which cannot be avoided at any particular case"

And that:

"Where are alive to the fact that due to frailty of human memory, a witness is not expected to be accurate in minute detail when retelling and more in particular if the matter is on details".

She contended that the prosecution managed to establish the commission of the offense that is Carnal knowledge against the order of nature to the victim, PW2. PW2, the prosecution's star witness narrated to the court how the appellant committed the heinous act on him the evidence that was corroborated by PW4 the Doctor who conformed to the court that the victim was penetrated.

Regarding the flouting of section 214(1) of the Criminal Procedure Act, the learned State Attorney argued that the section was inapplicable in the present matter. She therefore urged the court to dismiss the appellant's lamentations for being unfounded.

I have dispassionately considered the appeal. I have no speck of doubt that the trial magistrate failed to reflect in the proceedings, the questions that were put to the tender-aged witness in soliciting his promise that he would tell the court the whole truth and nothing but the truth under section 127(2) [Cap 6 R: E 2022]. Both parties agree to the position of the law above that the tender-aged witness can give evidence without oath or affirmation but before doing so, he must promise to tell the truth to the court and not to tell lies. There is a plethora of authorities on this point, see for instance **Ramadhani s/o Aito v. Republic**, Criminal Appeal No. 361 of 2019, **Msiba Leonard Mchele Kumuaga vs. Republic**, Criminal Appeal No. 550 of 2015, **Masanja Makunga v. Republic**, Criminal Appeal No. 378 of 2018;**Issa Salum Nambaluka v.**

Republic, Criminal Appeal No. 272 of 2018 (unreported) and **Godfrey Wilson Vs Republic,** Criminal Appeal No 168 of 2018(All unreported) to mention just a few. In the latter case, the Court of Appeal held:

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

Speaking on how the court should arrive at receiving such a promise from a witness of tender age, the court said:

> *"The question, however, would be how to reach the stage.We think the trial magistrate or Judge can ask the witness of 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 that the child professes and whether he/she understands the nature of the oath.*
> 3. *Whether or not the child promises to tell the truth and not lies thereafter upon making the promise, such promises must be recorded before the evidence is taken."*

And relying on the above decisions in **Issa Salum Nambaluka v. Republic** (Supra) the held:

> *"... where a witness is a child of tender age,* ***a trial court should at the foremost, ask a few pertinent questions so as to determine whether or not the child witness understands the nature of oath****. If he replies in the affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such a child* ***does not understand the nature of the oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies****. "[Emphasis added]*

In the case at hand, it is evident on page 7 of the record that PW2 a witness of tender age and a victim of the offence was called in court to testify on the incident. The Presiding trial magistrate did not however show how he obtained the witnesses' promise that he would tell the court the truth and not lies as required under section 127(2) of the Evidence Act. The following was captured from the records:

> ***"PW2****: ABDALLAH WILLE,5 years old, resident of Minyekera.*
>
> ***Court****: PW2 is a child of tender age, he has been addressed in terms of section 127(2) of TEA Cap6 R: E 2022, and respondent that.*
>
> ***PW2****:" I promise to speak the truth and not to speak lies".*
>
> ***Xd by pp****:…."*

Distinctly, the trial court did not observe the provisions of section 127 of the Evidence Act.:

> *"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 any lies".*

I think this section was not blindly drafted. As a general rule, every witness in criminal proceedings including children must give their evidence on oath or affirmation as provided for in section 198 of the Criminal Procedure Act [CAP 20 R.E. 2022] stating that:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act*."

However, unlike adults, before giving evidence whether on oath or otherwise, the child witness must be examined to ascertain if they understand the meaning and nature of the oath or not. The promise envisaged under section 127 of the Evidence Act comes in after the court is satisfied that the child is not capable of giving evidence on oath. In that situation, the evidence is to be recorded after a promise to tell the court the truth and not lies under section 127(2) of the Evidence Act. There was no such establishment in this case. The records did not disclose the questions that were put to the child witness to establish whether he knew the nature and meaning of the oath or not before he was allowed to promise the court that he would only tell the truth. This omission is in my view fatal. It renders the evidence of PW2 inconsequential.

I would have under the circumstances of this case ordered a retrial more so because no party to the case was responsible for the pointed-out omission. However, it is settled that a retrial would only be ordered if it is in the interests of justice to do so. In **Fatehali Manji v. R** [1966] EA 341, the Court held:

> *"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.,...each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it"*

A thorough assessment of evidence affirms the 1st and 3rd grounds of appeal, on the reliability of the visual identification evidence and major contradictions in the prosecution evidence that reduces the entire prosecution case to a goose egg.

It is certain that the offense was committed at night hours. This fact is confirmed by PW2, the victim on page 8 of the proceedings, and PW1, the victim's uncle who told the court on page 5 that the victim returned home at 21.00 hrs at night. PW3, the police investigator maintained that at the accused's house the victim left at a late rainy hour of the day. Though it is stated that PW2 mentioned the accused as the perpetrator after he was interviewed by PW1, PW2 did not say how he managed to identify the accused, the source of the light, and the intensity of the light that was used. This is serious because PW3 told the court that it was the Accused's wife who commanded the victim to go back home for it was

already late and that the victim left leaving the accused at his home. One would argue here that this was pure evidence of recognition for the victim was familiar with the accused. That is very true, however, the Court has occasionally insisted that although evidence of recognition may be more reliable, courts must be cautious to act on it as held in **Hamis Hussein & Others vs Republic**, Criminal Appeal No. 86 of 2009 (unreported) that: -

> *"We wish to stress that even in recognition cases when such evidence may be more reliable than the identification of a stranger, clear evidence on the source of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of dose relatives and friends are often made."*

Considering the above position and the circumstances of this case, I hold that the evidence of identification of the accused at the scene was of paramount importance to establish whether the accused whom the victim had left at his home was the same person who sodomized him at the banana trees as alleged.

Worse, the prosecution evidence is contradictory to the extent of damaging the witnesses' credibility. PW2, evidence in chief at page 7 of the proceedings was that:

> *"…I remember I was returning home from "kwenye tela" where I was playing with my friends Aisha and Zena. I was returning home together with Aisha. Then Magandi grabbed*

my hand Aisha flee away and took me up to MAdizini (Migombani)…"

During cross-examination, this witness changed the story:

"…I returned home at night. I returned home, but nothing happened. I was playing with Shadia and Others".

Inversely, PW3, the police investigator told the court that on the material date, the victim was playing with Ikram. And as if that is not enough, while it is the victim's story that he returned home at night and there was nothing happened on that material night, PW1, his uncle told the court that they found the victim in the banana tree crying and he had to carry him back home. This contradiction creates doubt in the prosecution case.

Based on the above inadequacies, the court is convinced that the prosecution evidence is weak and therefore a retrial order will not be in the best interest of the appellant. The appeal is thus allowed, and conviction is set aside with an order for an immediate release of the appellant from custody unless he is otherwise held for other lawful cause.

DATED at **DAR ES SALAAM** this 22nd day of **September** 2023.

E. Y Mkwizu
Judge
22/9/2023